

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

CASE NO - 95-00934-CA

DIVISION: CV-B

GRADY CARTER and
MILDRED CARTER,

Plaintiffs,

vs

BROWN & WILLIAMSON TOBACCO
CORPORATION, as successor by
merger to THE AMERICAN TOBACCO
COMPANY,

Defendant.

PROCEEDINGS held before The Honorable
Brian J. Davis, Duval County Courthouse, 330 East
Bay Street, Jacksonville, Florida, on Thursday,
August 8, 1996, at 8:00 a.m., before Leslie M.
Roach, Registered Professional Reporter-CP, and
Notary Public in and for the State of Florida at
Large.

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E X H I B I T S

Joint
Into Evidence

P R O C E E D I N G S

August 8, 1996

8:00 a.m.

(Present in chambers are Mr. Maxwell,
Mr Cronin, Mr Prichard, Mr Vollins and
Mr Parrish)

THE COURT Mr Prichard

MR PRICHARD. Good morning, Judge

THE COURT: Good morning. This is a copy
of the draft instructions that were finalized last
night after some, some delay, I guess. I apologize
for that

MR MAXWELL I'm sorry We are working
through them And we have gone through about
halfway

MR CRONIN Third

MR MAXWELL Halfway.

THE COURT. We still have time.

MR MAXWELL: We will continue to do
that We haven't seen any problem so far.

MR CRONIN. This is typo stuff

MR. MAXWELL: We can get with them after
it's finished.

MR. PRICHARD. I think we have a couple
of -- we have an exhibit to put in first thing.

MR MAXWELL: Yes, the medical records.

1 MR PRICHARD: I need to look at the
2 other ones that were going to be redacted. That
3 will take a minute or two, Your Honor

4 There is one thing, Your Honor, and I
5 know there was a long conference yesterday And
6 I was not participatory in it. But it seemed to us
7 in looking over the instructions last night and
8 really is in the hope of avoiding built-in problems
9 that we think we see, there was one portion of the
10 charge or one charge that, in our belief, certainly
11 did not comport with what we think the current
12 state of the law is in Florida

13 And I really am not -- even though I have
14 done it, Your Honor, and I apologize, throughout
15 this course coming after your rulings.

16 THE COURT: No apology needed. Let me
17 hear your concern.

18 MR. PRICHARD: It's been a long trial.
19 Nobody wants to see it end up -- perhaps an error,
20 perhaps a problem that could be cleared up, if it
21 deserves it

22 Really it has to do with the Adams case
23 and failure to test allegations. Mr Vollins has
24 reviewed the case, I know, more than probably I
25 have. But we are concerned that the way that this

1 instruction has been put in with the rest that it's
2 not -- it's just not a true statement of the law,
3 Your Honor. That was number --

4 MR VOLLINS It doesn't have a number
5 anymore.

6 MR PRICHARD It was the one about
7 the manufacturer bears the duty to test its
8 products to uncover all scientific and discoverable
9 dangers before its products are sold

10 And I think, Your Honor, in looking at
11 the rather long conference yesterday that there was
12 some belief by the court that Adams stood for the
13 proposition that all scientifically discoverable
14 dangers were -- was a very central element of that
15 proposition

16 This is a highlighted copy of the case,
17 Judge I don't know if you have had a chance to
18 read that. But I apologize for a highlighted
19 copy With all the paper that's been flying, we
20 can't seem to find two copies of that case, but...

21 Again, this is the -- we believe is the
22 imposition of the Texas standard into the Florida
23 jurisprudence.

24 THE COURT: Okay. The highlighted copy
25 that you provided on page -- I'm not sure whether

1 we have all got the same page designations or not.
2 I think this is page 730.

3 The trial court correctly disposed of the
4 claim for negligent failure to test That court
5 alleged that Searel negligently failed to perform
6 tests to determine its defects and dangers. We
7 agree with Cocienda versus Searel, 707 Fed Sup.,
8 that a manufacturer's duty to inspect and test is
9 not a separate cause of action

10 The duty to test, as that court
11 concluded, is a subpart of a manufacturer's duty to
12 design a product with reasonable care And thus it
13 is subsumed in the plaintiffs' claim for defective
14 design and failure to warn. We, therefore, affirm
15 that the summary judgment ..is that the language
16 that you wanted me to consider?

17 MR. VOLLINS: Your Honor, yesterday we
18 had argued that the Adams case -- and I don't think
19 any Florida case stands for the proposition that a
20 manufacturer has a duty to test or uncover all
21 scientifically discoverable dangers.

22 And Plaintiffs' counsel represented to
23 the court that the Adams case did; and Your Honor
24 agreed. And I think that's the only thing in the
25 Adams case that deals with the failure to test

1 allegation

2 And I don't see any support in it for the
3 proposition that we have a duty to test to uncover
4 all scientifically discoverable dangers. Maybe we
5 have a duty to test, and that's a component of a
6 negligence claim

7 But I think this instruction is way
8 overly broad and just an incorrect statement of
9 the law

10 MR MAXWELL: When you consider this case
11 in conjunction with the Advance Chemical v Harter
12 case, which says that a manufacturer has a duty to
13 be an expert, an expert in the manufacture of its
14 product, this is a correct statement of the law

15 MR PRICHARD Your Honor, even experts
16 are bound by some duty of reasonable inquiry.
17 And basically this is a -- like saying if it's
18 discoverable at all by the best science there is,
19 that's what they've got to do.

20 MR MAXWELL: That's right. That's what
21 an expert is.

22 THE COURT: All right. Let me say
23 this: I'll make a decision about this particular
24 instruction. I'm going to take the time to read
25 the -- to study the other case authority that's

1 been cited.

2 The worst case scenario for purposes of
3 advising your counsel, your co-counsel, is that
4 I'll give an instruction that says a manufacturer
5 bears the duty to fully test its products before
6 its products are sold. That's the worst case
7 scenario The best -- well, depending upon your
8 perspective. The other worst case scenario is I'll
9 give it as written

10 So they'll need to just be aware of that
11 in making their argument But I'll take some time
12 to look at that and study it before I make a
13 decision

14 MR MAXWELL. Your Honor, here's the
15 original verdict form And before I hand it to
16 you, let me -- it occurred to us last night
17 in looking at this, the one that we discussed
18 yesterday on page two had lines for total damages
19 for Grady Carter and total damages for Millie
20 Carter

21 We thought perhaps it was inappropriate
22 to have those total damages lines and require the
23 jury to add those figures up. We thought the Court
24 could do that, if they reach that. So we deleted
25 those lines from four and five.

1 We have the other version that has those
2 lines in there, if Your Honor desires to use that
3 or if counsel has an objection to that. That's the
4 only change on this

5 MR PRICHARD I guess then we would
6 incur the mathematical possibilities of error by
7 the Court. I guess it was fully discussed, but if
8 you put total --

9 THE COURT I can add

10 MR MAXWELL. We trust your math more
11 than we do the jury's

12 MR PRICHARD If it just said what is
13 the total amount of damages past and future, one
14 line, then they can't mess up You get your -- in
15 the body. Do you see what I'm saying?

16 THE COURT. Let me see both of them.
17 I'll make some decisions about that.

18 MR MAXWELL: Here is the original and
19 two copies.

20 THE COURT. Of both formats?

21 MR. MAXWELL. I guess all you need is the
22 original Here's the original of the other one
23 that has the total lines.

24 MR. CRONIN: You want a couple of those?

25 THE COURT: No, I just need one. But

1 make sure opposing counsel has both versions.

2 MR PRICHARD. I appreciate it. There is
3 no telling -- thank you

4 THE COURT. All right.

5 MR PRICHARD Thank you very much, Your
6 Honor I appreciate it

7 (The in-chamber proceedings were
8 adjourned at 8 05 a m)

9 - - -

10 (The following proceedings were held in
11 the courtroom)

12 THE BAILIFF All rise This court is
13 again in session Be seated, please.

14 THE COURT Good morning.

15 MR. MAXWELL. Good morning, Your Honor.

16 THE COURT Is plaintiff ready to
17 proceed?

18 MR. WILNER. Yes, Your Honor.

19 THE COURT: Is the defendant?

20 MR. SHEFFLER: Yes, Your Honor.

21 THE COURT: Mr. Forte, bring the jury in,
22 please

23 THE BAILIFF: Yes, Your Honor. Jurors
24 enter, please.

25 (Jury enters courtroom)

1 THE COURT Please be seated

2 Mr Prichard, and Mr Maxwell

3 MR PRICHARD Good morning, Your Honor.

4 At this time we would like to go ahead and formally
5 introduce the medical records which has been

6 stickered Plaintiffs' No 30 and Defendant's 19,

7 one exhibit It's the medical records of

8 Mr Carter

9 THE COURT So marked and admitted.

10 MR MAXWELL: We have one additional

11 exhibit that was being modified to comply with the

12 Court's ruling that should be here momentarily.

13 Let me check with my clerk on that I need to show
14 it to opposing counsel.

15 THE COURT All right, very good.

16 MR. MAXWELL: May we approach the bench?

17 THE COURT. Do you need the reporter?

18 MR MAXWELL: We may.

19 (Side bar, court and counsel)

20 THE COURT: Good morning, Lady and
21 Gentlemen. Both the plaintiffs and the defendant
22 have now rested their cases. The attorneys will
23 now present their final arguments. Please
24 remember that what the attorneys say is not
25 evidence, however, do listen closely to their

1 arguments They are intended to aid you
2 understanding the case

3 Each side will have equal time. But the
4 plaintiffs' are entitled to divide their time
5 between an opening argument and a rebuttal argument
6 after the opponent has spoken. Mr Wilner.

7 MR WILNER May it please the Court.

8 THE COURT. Yes, sir.

9 MR. WILNER Good morning. It's a
10 pleasure to talk directly at you again And let me
11 tell you first what I'm going to be doing. I had a
12 chance to talk directly to you at the beginning
13 of the case. And since then you have seen the
14 witnesses come and go. You have seen the
15 give-and-take. And we didn't have a chance to
16 go back to you and say, This is what that meant.
17 You know, I wanted to do it. But we couldn't.

18 So now we have a chance to do that
19 again And although we have two hours apiece to
20 do it, it's going to go really fast. Sometimes I
21 may talk a little faster than you want me to.

22 But I guess I could stay up here all day
23 because there is a lot I want to tell you But I
24 won't be given that opportunity. So I'm going to
25 talk for about an hour and 20 minutes and I will

1 sit down And Brown & Williamson will present, I
2 think, for about two hours Then I will have a
3 chance to rebut what they say, if I choose. That's
4 the big picture

5 All right. Well, we are here finally at
6 the end of this case And I certainly appreciated,
7 I know all of us have, the way that you have been
8 attentive and treated this presentation of a lot of
9 this evidence You know, I talked in my opening
10 statement about how this was not a criminal case,
11 this was a civil case, and how important really
12 that distinction is Because in this case, we do
13 not seek to do -- to put people in jail We do not
14 seek a change on the legislative level We are not
15 trying to ban cigarettes We are not trying to --
16 we are not the White House and we are not the
17 Congress

18 And some people, I think, think that
19 major social change occurs only in Washington.
20 But that's really wrong. That's really wrong
21 You know, the way this country is set up, it's
22 a free and open society It gives manufacturers
23 the right to make products and sell them. And
24 cigarettes are one product that has escaped,
25 virtually escaped regulation

1 And the laws of this country are set up
2 to give the manufacturers the right to do it and
3 the right to advertise almost without restriction.
4 But, and here's the big "but," those laws require
5 the manufacturers to use reasonable care And I'm
6 going to prove to you that reasonable care in the
7 case of a product like this which causes death, as
8 it does, which is inhaled into the intimate
9 recesses of your body that reasonable care requires
10 a lot

11 So the laws of the country require
12 reasonable care if you are going to go out and sell
13 the product And what they say is that if you
14 don't do that, if you don't follow this reasonable
15 care, then somebody like Mr Carter is going to
16 come along many years later, bring an action like
17 this one in an ordinary court somewhere in the
18 United States, not necessarily in New York, not
19 necessarily in Washington. Jacksonville, Florida.
20 Somebody is going to do it.

21 And that if you are selling a product,
22 if you are out there making money and you are out
23 there advertising and you're -- and you're -- and
24 selling this product to consumers, that you have at
25 your peril to follow these negligence laws. You

1 have at your peril to use reasonable care. And if
2 you don't, well, nothing may happen to you for a
3 long time until one day in some courtroom around
4 the country a jury like yourself hears what you
5 have heard and makes a decision.

6 And it's that pressure on manufacturers
7 like Brown & Williamson Tobacco Company that is
8 supposed to keep them in line And that's the
9 civil law system And it's a great system. I
10 mean, it's supposed to work It's reasonable and
11 proper that it work like this

12 Now, it may be that you, you know, we
13 can't -- we can't divorce ourselves from the world
14 and we know that people -- people talk about cases
15 like this. You have been on your oath not to
16 discuss this case But I know you can imagine what
17 people might say. And some people might say, well,
18 Look, this is all very interesting. But isn't it
19 true that Mr Carter did smoke these cigarettes
20 himself. Nobody put a gun to his head. How can he
21 file an action against the manufacturers? I mean,
22 we have all heard talk like that. Not in here very
23 much, but we have all heard talk like that.

24 And that brings me really to what I'm
25 getting to, really to some of the philosophical

1 issues first and then we are going to talk about
2 all sorts of interesting things we talked about
3 with the witnesses

4 But the people that you might hear that
5 kind of remark from, they haven't sat through what
6 you have sat through, you know They have not sat
7 through Dr. Feingold's explanation of what went
8 on It takes some time, and it took us up until
9 now to get to present -- it was our job, it's our
10 duty to prove our case And if we over-proved
11 our case, if we put on too much evidence, I stand
12 convicted. Perhaps we put on too much evidence
13 Perhaps we proved our case too much. But I think
14 that you deserve to have all of it You really
15 deserve it We took our obligation to do that
16 proof very seriously and tried to do it very
17 quickly

18 So Dr. Feingold, Dr. Yergin and others
19 told you for days, literally for days what the
20 struggle has been, how they struggled, how -- how
21 the scientists struggled against the industry to
22 get the word out, how this happened, this epic
23 thing happened back in the '50s that got -- that
24 barely got moving and then eventually got rolling,
25 and how the industry and American Tobacco resisted

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1 it, dug their heels in and said, No, we are not
2 going to go along. We are going to deny, deny,
3 deny We are going to keep selling. We don't want
4 to warn We don't want to be responsible. We
5 think if we just keep denying, if we just keep
6 putting up enough confusion that we can keep in
7 business and we can keep making money.

8 And people who might say, well, you know,
9 Mr Carter, whoever bought these products have not
10 been through what you have been through It's
11 really your case It's your decision It really
12 isn't anybody else's, because there is nobody in a
13 better position

14 You have seen the medical evidence.
15 And I'll review some of that You have seen
16 the evidence of what American Tobacco, Brown &
17 Williamson Tobacco and what they did in response
18 to it. You will hear what the law is exactly. You
19 have seen what -- a little slice of what the
20 society was If you were around there, you might
21 remember it, if you weren't old enough in the '50s
22 or weren't born in the '50s to remember it, it was
23 kind of interesting and kind of quaint.

24 You have seen that directly. And there
25 is nobody in a better position than you are to make

1 these decisions. So whatever buzzing in the ears
2 you might hear, remember, you are the ones who are
3 the experts now about this kind of stuff And it's
4 an incredible story, I mean, it's an unbelievable
5 story

6 Also, you might hear buzzing in the ears,
7 well, Mr -- didn't Mr. Carter, assume the risk
8 when he smoked? I have heard that a lot. Well,
9 as a matter of fact, as a matter of fact, when
10 -- remember we talked about this in opening
11 statement When the -- when the country moved away
12 from the corner grocer, who you had a direct trust
13 in, to a mass marketing, a mass economy, something
14 had to come in to replace that personal bond that
15 you had with the grocer And what came in was the
16 products liability law. Like them or not, that's
17 what came in to replace the one-on-one trust that
18 you used to have with the guy who sold you the
19 stuff, who wouldn't sell it to you if it was bad.
20 Because, you know, he knew your children. You knew
21 him. He wouldn't sell you bad stuff. Nowadays
22 what have you got?

23 The only thing the consumer has today is
24 the consumer protection law, the civil loss that we
25 bring this case under that require manufacturers to

1 be truthful and honest.

2 So there is no more any defense, there is
3 no more assumption of risk by a consumer in the
4 State of Florida That is gone, gone You will
5 never hear it again You don't assume the risk by
6 buying a legal product You are protected You
7 are protected in Florida The legislature has done
8 that. The courts in the state have done that.

9 They have said the burden is on the
10 manufacturer to be truthful and honest. It's not
11 on you. If that product is out there and legal, no
12 one can come back to you later and say, Oh, well,
13 you just assumed the risk by buying it and using
14 it Now, I'm not saying that you can't buy a
15 product and use it wrong. If you run your car into
16 a tree, that's wrong. You're negligent That's
17 not saying you come back and sue the car company
18 for running your car into a tree I'm not saying
19 that

20 But, remember, there is no claim in
21 this case that Mr Carter did anything wrong.
22 None, none. It's important to think about that.
23 He didn't missmoke any cigarettes. He didn't --
24 he didn't smoke too many. According to Brown &
25 Williamson, he didn't smoke too much of them.

1 There is no claim that Mr. Carter did the first
2 thing wrong

3 That's kind of a smoke screen. That's
4 kind of trying to blame Mr Carter for getting
5 sick. And I'll talk about that more in the
6 future But that's usually the buzzing that you
7 hear

8 And you'll see -- actually, the case is
9 very simple. And I'll show you the verdict form in
10 just a second that you will be asked to fill out.
11 And really, you know, with all the philosophy and
12 all the science it gets down to just a few issues.
13 And luckily those issues are simple and they're
14 well-defined in the law

15 Was Brown & Williamson negligent? Was
16 the negligence the legal cause? Did they put on
17 -- put a defective product out? Was that a legal
18 cause? If so, what are Mr. Carter's damages?

19 And there may be other issues that you
20 say, well, philosophically there are other
21 interesting things to think about. Well, who
22 knows. The good part about the law is it tells you
23 what the things are that we are supposed to think
24 about it.

25 All right. Other people say the case

1 is too big, the case is too small We have been
2 through that This case could be so big that you
3 sit there and think, Oh, my God, if I decide to
4 award Mr Carter the whole country will change and
5 everybody who has a cigarette-related disease will
6 sue the cigarette companies. They'll all go out of
7 business It will be the end of the world And
8 how can I do that?

9 Well, that's not what you are going to do
10 because that -- this case is this case. It's a --
11 it's whatever it is. It is Mr. Carter's case. You
12 are not the legislature of this country You are
13 not the Congress You can't possibly imagine what
14 might or might not happen I mean, you could --
15 you could do right. You could do the correct
16 thing You can follow the law. But you are not
17 asked to do more. You are not asked to take on
18 this huge burden about, oh, my God, what could
19 happen?

20 Secondly, you might think the case is too
21 small to decide. In other words, you might think,
22 well, look at this huge problem that we have.
23 People still are addicted to cigarettes. People
24 still smoke them. Young kids still take them up.
25 Are they going to be the Mr. Carters of the

1 future? How can we do any good? How can we do any
2 good? Even if we believe you, Mr. Wilner, what is
3 this? This is a waste it's one out of so many
4 people that are sick. So the case is too small you
5 say It should be bigger. Either too big or too
6 small Well, not really

7 Again, the civil law works this way
8 The civil law that we are in says you do this
9 case It says the ramifications of the case are
10 left to other people other times I mean, you do
11 the right thing here. This is the way the system
12 works If a swimming pool rises, it finally
13 overflows. Where does it overflow? In
14 Jacksonville? In New York? San Francisco?
15 I don't know Somewhere it just overflows.
16 And maybe that's the beginning of a social change.
17 Maybe.

18 Courts can set social policy. They do
19 it all the time. They do it all the time. It's an
20 important thing for courts to do.

21 Okay, nuts and bolts. That's
22 philosophy. It's important because philosophy
23 keeps coming into this case. All right. Well,
24 you say, Mr. Wilner, what am I supposed to do?
25 Well, first another rule of how to conduct -- or

1 how we conduct this case And that is it's a civil
2 case Preponderance of the evidence Big word.
3 Preponderance What does it mean? It means we
4 don't have to prove the case beyond a reasonable
5 doubt That's the crime business That's the law
6 of crimes

7 We prove only a little bit more than
8 average, a little bit more than balanced.

9 51 percent is what the civil law says the claimant
10 has to prove. We stand up to you straight and tall
11 and tell you we proved 99 percent We only have to
12 prove 51 percent I think you will hear carping
13 about the 1 percent. And nobody is perfect, so
14 obviously we can't prove everything We did an
15 astounding job of proving 99 percent We only
16 needed to prove 51 percent. But it's not -- the
17 standard is not beyond a doubt. And I'll get back
18 to that.

19 The real question that you will be asked
20 -- well, let me get directly to it. Let's start
21 with the end, which is let's start with the verdict
22 form. Just so I can come back to it later. After
23 I run out of time I'll say, Oh, my God, I didn't
24 tell you about the verdict form The verdict form
25 that you will be asked to fill out will look

1 something like this

2 Thank you, Ginnie.

3 It will say, We, the jury return the
4 following verdict Was there negligence on the
5 part of Defendant Brown & Williamson Tobacco
6 Company, successor by merger to The American
7 Tobacco, which was a legal cause of loss, injury
8 or damage to plaintiffs A legal cause It
9 doesn't say the only cause. I'll talk about
10 cause You know, this case has gone nuts about
11 cause It's really very simple

12 The law of Florida defines cause And
13 I'll tell you what -- his honor will probably
14 instruct you that So this is not a big deal.
15 Which was a legal cause of loss, injury or damage
16 to the plaintiffs, Grady and Mildred Carter. We
17 suggest to you that is -- by any standard of law,
18 logic, decency and morality, the answer is yes.

19 Were Lucky Strike cigarettes manufactured
20 by Brown & Williamson, as successor by merger,
21 blah, blah, blah. Unreasonably dangerous and
22 defective And the answer is, there is no
23 question. We will prove it. I'll prove it in the
24 next 20 minutes what we proved for the last three
25 weeks They were put on the market in a way after

1 the Brown & Williamson, American should have known
2 that they were terrible And they didn't take
3 steps to clean them up And they were bad news
4 Unfiltered Lucky Strikes Cancer Cancer-causing
5 products. Bad news So we say yes. No question.

6 If you answered yes, then -- if you
7 answer no to both of those questions, then your
8 verdict is for Brown & Williamson and we're done.
9 You don't do anything more And Grady Carter has
10 failed to prove his case and lost If you answer
11 yes to either one of these, you go on to answer the
12 remaining of the verdict form

13 This question is, is the plaintiffs'
14 cause of action barred by the four-year statute of
15 limitations? This is what I call a trick defense
16 by Brown & Williamson It's not barred It's very
17 clear that it's not barred. I'll prove that to you
18 in the next five minutes. It depends on when it
19 was filed. It was filed on the 11th of -- or the
20 10th of February 1995 The operative date is the
21 10th of February 1991. That was before Mr. Carter
22 came back to see Dr. Yergin and was told he had
23 cancer. It was right in the middle of the
24 procedure where he had gone in on the 5th.
25 Dr. Yergin had said, well, you know, this doesn't

1 look good But we will give a bronchoscopy.
2 And he went out, got his bronchoscopy, came back.
3 Unfortunately it was a bad deal, really bad deal.
4 It was cancer That was the 14th We will go back
5 through that if we have time.

6 But it's a trick to suggest that you got
7 to start in the middle of the diagnosis. Like
8 you see the doctor, he says, Okay, I got to check
9 you out But then you got to run out and file
10 the case That doesn't make sense. It's a trick
11 defense

12 But if you say they are barred, if you
13 say yes here Mr Carter is through. If you say no,
14 which is -- because it's not barred, which we will
15 prove to you, then we go on

16 These are damage forms where you'll be
17 asked to fill out what damages Grady Carter has
18 suffered. And this is the hard part of me -- for
19 me to suggest to you what damages. This is really
20 hard to pick for you a suggestion, because it is
21 not a case like a contract case that says x-dollars
22 have been lost in this, in this transaction.

23 We are dealing with human pain, suffering
24 and anguish. And there is no -- there is no one
25 single yardstick to set So I'm going to suggest

1 some figures. And, you know, every time I do
2 someone says, Well, that's too high, Mr Wilner.
3 That's ridiculous. Someone else might say, Well,
4 that's too low And someone might say, well, you
5 are suggesting a figure that's so high so you'll
6 cut it down. Somebody else says, Well, no,
7 actually that's a figure that he suggested because
8 he didn't want to suggest too high. But you can go
9 crazy like this.

10 So all we will do is we'll tell you,
11 Look, we think -- what a fair figure is I'll tell
12 you that last And that's it

13 And you say, Wait a minute, where is
14 all the interesting philosophy? Where is the
15 assumption of risk? There isn't any. That's not
16 covered. That's covered -- that's philosophy.
17 This is the law This is the law form. That
18 business about, you know, that I talked about
19 before about, you know, consumers this and
20 consumers that. That's interesting philosophy, but
21 it's not here. And if it were here, we would be
22 talking about it. Well, I am talking about it.
23 But it's not on the verdict form because this isn't
24 the law.

25 And the people you might hear on the

1 street don't know that They don't know lots of
2 stuff. They don't know lots of stuff that you have
3 heard Amazing. It's amazing All right.

4 Okay. That's the verdict form Now, let
5 me cover a couple of things before I got into the
6 nuts and bolts of the facts and go back into DNA,
7 DNA Peripheral adenocarcinoma, oh, my God. I
8 don't even want to do it But we are going to do
9 it because it's our obligation to do it

10 Okay. So let's go -- let me tell you
11 what our understanding of the law that Judge Davis
12 will charge you with 458 This is not the charge
13 on the law because Judge Davis is a sole source of
14 the law in this courtroom And he will charge
15 you. When we are done talking to you, he will
16 charge you with the law. And you are obligated to
17 take that law and go back and -- and apply it to
18 the facts of the case.

19 Basically what we understand the charge
20 to be is that a manufacturer has a duty to warn
21 and must use the knowledge of the medical and
22 scientific community at that time. And we will --
23 we have gone through days of what the knowledge of
24 the medical and scientific community is. I won't
25 have time to tell you again.

1 But a duty to warn attaches not when
2 scientific certainty is established. Now, that is
3 really important because all we have heard today
4 are doubts -- or not today, but in this trial
5 we have heard so many doubts from the Brown &
6 Williamson Tobacco Company. Doubts about that
7 they weren't sure of what the scientific evidence
8 proved They had some doctor that said they
9 weren't sure Nobody is sure. Everybody is
10 befuddled

11 But the point is the duty to warn
12 attaches not when scientific certainty is
13 established but when a reasonable man would want to
14 be informed of the risk in order to decide whether
15 to expose himself to it, not when scientific
16 certainty attaches

17 Although, as a matter of fact, scientific
18 certainty was attached at least as of 1953. I
19 mean, it really was. There were a few paid
20 doubters at that time. And, you know, we saw the
21 modern day incarnations, the modern day people of
22 the paid doubters came back and actually testified
23 in this courtroom.

24 Dr. O'Hanley He came in and said
25 basically what was said back in the '50s.

1 "I don't know anything. I can't prove anything."

2 The rats that were exposed to the Lucky
3 Strike condensate and got cancer, I don't know
4 if it was caused -- and, you know, that kind of
5 befuddlement, sure, that has always existed

6 So a duty to warn attaches not when
7 scientific certainty is established, but when
8 a reasonable man would want to be informed

9 A manufacturer has a duty to possess
10 expert knowledge in the field of its products.
11 Mr Carter does not have that duty. He's not held
12 to be an expert, doesn't have to read the medical
13 literature A manufacturer has the duty

14 And a manufacturer has a duty to fully
15 test its products to uncover all scientifically
16 discoverable dangers before its products are sold.
17 Pretty important, I think. You know, Mr. Sprinkle,
18 that guy we deposed from American Tobacco said they
19 never tested it. They never tested it.

20 They never, I mean, they -- they sort of
21 wanted to go along, kind of sit there and hope for
22 the best. Reader's Digest would write something
23 and they would kind of cringe and say couldn't be.
24 Where was there leadership to go out and test the
25 product? This is the law.

1 If His Honor charges you, which I believe
2 he will, that the manufacturer has a duty to fully
3 test its products, it's a shame what we have
4 uncovered It's an incredible sight that this
5 deadly product was on the market for so many years
6 with nothing

7 And, you know, consumers have a right
8 really to believe, to hope that their manufacturer
9 -- that the manufacturer is doing its job. How
10 else can they possibly decide what to do? So we
11 think that's really important, too.

12 Next, 459 And you wonder what a
13 defective product is. A product is defective if
14 it's unreasonably dangerous and is placed in the
15 hands of the consumer without a warning. Now, it's
16 true there is a duty to warn only when the hazards
17 are not obvious.

18 I don't know if they're going to argue
19 that the hazards of Lucky Strike cigarettes are
20 obvious. Cancer 40 years later is obvious? I
21 think that's part of the Reader's Digest defense.
22 I don't think that they will argue that there is
23 anything about a cigarette package that's obvious.

24 Obvious means it's obvious that if
25 you fall off the building it's going to hurt. A

1 cigarette being offered to you, unless you know the
2 medical there is nothing at all obvious. In fact,
3 it suggests that it's really pretty good or not as
4 well known to the user as the manufacturer.

5 That's kind of a joke Since when is
6 the user -- the manufacturer is the expert. The
7 manufacturer can't put its head in the sand. A
8 manufacturer who knows, who has reason to know the
9 product is likely to be dangerous in normal use has
10 a duty to warn those who may not fully appreciate
11 the possibility of the danger

12 The warning should be of such intensity
13 as to cause a reasonable man to exercise for his
14 own safety caution to measure it with the dangers.
15 Intensity of warning. They put Dr Thompson on to
16 say that nothing would have done any good. Crazy,
17 unbelievable testimony. And I'll talk about him in
18 a minute

19 But think about this while we go through
20 some of the evidence. Think about how hard they
21 tried to warn -- "they" being American Tobacco --
22 compared to how hard they tried to sell. Think
23 about that. How hard did they really -- how
24 seriously did they try to get a message to the
25 consumers to warn of such intensity as to cause a

1 reasonable man -- there was nothing. There was
2 nothing

3 And even in 1966, when the federal
4 warning came out, that was totally lacking
5 intensity. It says "may be," may be hazardous.
6 That is a warning of such intensity? That's
7 ridiculous.

8 Now, Dr. Feingold proposed the package --
9 a package insert, which you saw And they had a
10 good time saying, Well, that's not as good as Yul
11 Brynner Yul Brynner would have been a better
12 warning Proved my case Why didn't The American
13 Tobacco Company hire Yul Brynner and give an
14 intense warning? Why not? No answer

15 Unbelievable testimony, I thought.
16 Unbelievable It wasn't as good as Yul Brynner.
17 Well, okay, then put Yul Brynner on. How much
18 did Yul Brynner -- how many times did he go on
19 television? He should have been on every day.
20 He should have been on. That's a valid point.
21 That proves my point. Thank you very much. It
22 proves my point.

23 Next, 460. Remember the cause business?
24 We played a big game of cause in this case. This
25 cause game, I want you to know, goes back to the

1 '50s, goes back to the '40s. Cigarette companies
2 and American Tobacco and Brown & Williamson have
3 been playing the cause game for years. They're
4 playing it here They're playing it big time.
5 And they want you to think that there is some
6 philosophical deal with cause, but there isn't.

7 And it -- and all cause is, it's very
8 simple Because we didn't have to live in the year
9 3000 to prove cause; if we did, there wouldn't be
10 any cause So negligence is the legal cause if
11 it directly in a natural and continuous sequence
12 produces or contributes substantially to producing
13 -- contributes substantially That's all it is.
14 It's not certainty

15 Dr O'Hanley kept saying certainty.
16 And he couldn't figure it out Dr. Pearl said
17 certainty. I'm not sure. I can't prove beyond a
18 doubt. All these words have nothing to do with
19 it. That's why we are kind of, so what? So what?
20 That isn't the issue. The issue is does it
21 contribute substantially?

22 Dr. Feingold, Dr. Yergin discussed that
23 at length, at length, at length. There isn't any
24 other explanation. Mr. Carter's cancer was caused
25 by his 65 pack years of smoking. His Lucky Strike

1 exposure, without that his cancer would have never
2 occurred This says, it was reasonably said but
3 for the negligence the injury would not have
4 occurred.

5 I'll prove -- they also want to play a
6 game because he smoked some other cigarettes later
7 that that somehow gets Lucky Strike off the hook.
8 That's ridiculous Nobody said that None of the
9 witnesses said that It's kind of like one of the
10 -- but we will prove that

11 In order to be regarded as a legal cause
12 of injury it need not be the only cause So that's
13 cause. All right.

14 So let's get our hands dirty or our feet
15 dirty and talk about some of the things -- now that
16 we've got the big picture, let's talk about some of
17 the things that came up in the case. And I'll try
18 to make-believe that you got questions, because you
19 can't ask me directly. I'll try to say, Okay,
20 well, this is, you know, what I think is the
21 answer.

22 Plate 348. Thank you, Ginnie.

23 Okay. The first thing I want to talk
24 about is this business of controversy as an
25 excuse. Now, here's what I mean. You remember

1 that we went on for days almost -- it seemed like
2 days, it probably wasn't days, but it seemed
3 like days -- presenting the great fight of the
4 scientists against the industry and how over the
5 years the, the knowledge became overwhelming, you
6 know, overwhelming.

7 In fact, it was -- there was a very
8 powerful suggestion in the '40s In the '30s
9 it came -- in the '40s, there was a powerful
10 suggestion. By 1950, you know, the roof blew off.
11 Wynder, Graham, Doll and Hill, both sides of the
12 Atlantic. All of a sudden the cat was gone from
13 the bag Things began to happen This was very
14 important

15 You'll see in your evidence, we presented
16 to you the actual medical articles. They're in
17 there You can read them if you want. It may take
18 a while But it's our business to give you the
19 facts. There they are.

20 There is also Dr Feingold's table in the
21 front of it to help. If there is anything you want
22 to see, you can look it up from the table there or
23 read the whole thing or don't read them. Whatever
24 they are, they're there. We put our cash on the
25 barrel and said you can read them if you want.

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1 They're there Is every article there? No, there
2 was thousands, of course.

3 A little game was played Feingold, you
4 didn't put in that. Big deal. The point is --
5 and, again, the issue is not whether some doctor
6 ever said anything different. Obviously there have
7 been paid doubters for years. There still are paid
8 doubters. That doesn't make them -- that doesn't
9 mean it made sense then It didn't make sense
10 now. And even if it did make sense that someone
11 had some doubt, that isn't the legal standard

12 Certainty not required Legal standard
13 is it's there, you better -- you warn at your peril
14 -- you warn or don't at your peril Your peril.
15 And way back then, the little birdie was on the
16 wall when they sat in the back room and the
17 American Tobacco boys said, Well, I'm concerned,
18 you know. Somebody came in and they said, oh, God,
19 you know, look at this, 1950, oh, my God, something
20 is happening. Our product is killing them.

21 Someone else said, Well, business is good
22 though, you know. Nah, we are not going to put a
23 warning on it. We are going to hang on. We are
24 going to hang tough. There wasn't a law that made
25 them put the warning on back then. There was no

1 marshal that came in and said you had to do it.
2 The only law was Grady Carter years later and
3 yourself. That's the way the law works Isn't
4 that weird?

5 You know, and you think how can I go back
6 and -- right or wrong, it happened so long ago
7 Well, it went into Grady Carter's body back then
8 and started smashing up his DNA We know that
9 And the way the law works, sometimes it takes a
10 long time to get around to it That's just the way
11 it works You know, I don't know why Maybe it
12 should have worked earlier But sometimes in this
13 country these things just bubble up They just
14 happen. It's the darnedest thing.

15 So, yes, you have to go back You have
16 to go back. You are the policemen to go back. You
17 are the time travelers here to go back and right
18 the wrong back then, which came out today, which
19 took Grady Carter's lung. That's the way the court
20 system works.

21 Sometimes it's an immediate harm.
22 Sometimes you put people in jail for what they did
23 last week. Sometimes the legal system says we are
24 going to go back and examine what you did a long
25 time ago because only by doing that, only by doing

1 that can we -- can we have some integrity in this
2 country about what is going to go on in the future,
3 you know.

4 And if you don't have that -- if you
5 think you can get away with it, you can't get away
6 with it. There are time bombs ticking in people's
7 bodies for things that you did to them years ago.
8 And you are not going to get away with it. You
9 can't escape it. And the only way you can be --
10 you can be made to 'fess up is in the civil law
11 like this. I think it's a great concept.

12 Okay, where was I? Well, anyway, you
13 have seen this. You have seen it. You have seen
14 it, you have seen it. It's the march of knowledge
15 against -- it's the battle of knowledge against
16 ignorance. It's the battle of fact against
17 deceit. It's going on today. It's still with us.
18 When are we going to shake it off? This is an epic
19 battle. It really is.

20 You know, Dr. Feingold came up here for
21 days, gave away his time, studied it, lined it up,
22 put it up on the desk there and said, Let's go,
23 let's tango, let's tell them. And when he talked
24 about what happened, well, sometimes we got a
25 little broken up about it. How can you get broken

1 up about this dry stuff, you know? How -- how can
2 you start to be moved by just what doctors wrote
3 this time ago?

4 But I think Dr Feingold got broken up
5 when he looked at this stuff and he realized that
6 this -- this is really important, what happened
7 here And it should not be forgotten You know,
8 he really understood

9 He really believed that this kind of
10 stuff and what happened and the fight and the
11 deceit is just something we need to remember.
12 And you know it People out there, outside this
13 courtroom, they don't

14 Okay So anyway, controversy,
15 controversy or should I say controversy,
16 schmontroversy. There was no serious controversy.
17 They were hired help saying things that they were
18 paid to say, just like Dr Thompson, \$30,000
19 witness came in and said, Grady Carter wouldn't
20 have followed a warning.

21 You know, I'll hold the warning in my
22 hand and look him in the eye and we will suggest
23 -- I don't want to get ahead of myself. But we
24 will suggest, you know, if your wife says don't
25 smoke it's kind of like hang up your socks, you

1 know But if she has -- if she has the facts, if
2 she has the message from the -- from the package,
3 if she sees the truth, if she can present this and
4 say, Look, this isn't about socks. This is about
5 your kids This is about you seeing your
6 grandkids This is serious. This is death looking
7 at you. This is the skull and cross bones or
8 whatever This is not socks. This is not smoke in
9 the house, hurt the furniture, you know This is
10 real

11 For someone to say that that has no
12 effect has to be a hired opinion because it defies
13 imagination And, in fact, if American, Brown
14 & Williamson, whatever, had lived up to their
15 corporate responsibility, if they had followed the
16 civil law, which we are the policeman of today and
17 put a decent warning, that they were obligated to
18 do back then, what would have happened?

19 Well, let me suggest to you that
20 something like this -- and, you know, they had a
21 lot of fun with the package insert. They said,
22 Oh, my God, package insert. What good is that?
23 It's too big We couldn't list ingredients on the
24 pack. It would be too long. Blah, blah, blah.
25 But, look, this is a suggestion.

1 Actually, Yul Brynner would be better.
2 Whoever you get. The big marketing powers of the
3 universe get them to work on this with the same
4 skill they put this stuff together and put it in
5 the hands of your loved one, puts it in the hands
6 of your child. So it's not, Daddy, come on, I
7 don't like your smoke But it's, Daddy, this is
8 what will happen to the inside of you, you know.
9 Put it so that it's everywhere, not just in the
10 Reader's Digest once a month, which has lots of
11 articles which you may or may not read

12 Reader's Digest is great They took on
13 the industry back in the '50s, they really did
14 You'll have some in evidence You should read
15 them They're fantastic. They don't take
16 anything They say this thing is bad. And they
17 say the industry doctors are all hired and they
18 don't make any sense. It's great There is
19 one called "The Facts Beyond the Cigarette
20 Controversy," and they point out the controversy
21 isn't real. It's fantastic. It could have been
22 written today.

23 Back then, I don't know. I mean, they
24 got a lot of things to read Reader's Digest, who
25 knows. That does not get the manufacturer off the

1 hook, huh-uh You can't expect other people to do
2 it for you No way You can't just say, Well,
3 because Reader's Digest wrote about it I don't have
4 to put the warning on the product that the civil
5 law requires me to do Since when? Since
6 nowhere That's a smoke screen It's ridiculous.

7 And how ironic that the company that took
8 them on in the '50s, poor little Reader's Digest,
9 should now be used as a defense by Brown &
10 Williamson. Sorry, okay

11 Anyway, put this -- imagine this in your
12 child's hands and say -- or, you know, whatever you
13 want to design I don't care about the design.
14 But put it in there and say, Look, baby doll, stare
15 into that Stare into the eyes. Serious stuff.
16 This is not a product that you take lightly,
17 because the lung is more delicate than your stomach
18 or your gut

19 The lung is the most delicate that
20 interacts with the environment. It's the size of a
21 tennis court crumpled up in there. And when you
22 got the stuff in there, stuff happens. It's real
23 bad. Lung cancer is real bad, not curable. The
24 other stuff that happens is also really bad.

25 So this was a life-and-death thing that

1 was trivialized by the industry in its search
2 for profits And it's a classic case of that,
3 absolutely a classic case and a shame A shame.

4 And it took up to now to be in the
5 position to say, Okay, enough is enough It's time
6 that the debt be paid. The private citizen has now
7 come forward with the proof, the private citizen
8 has come forward under the law And it's time we
9 start tallying this stuff up.

10 Okay What next? Causation God, I
11 talked about that Here's the only thing I want to
12 say since there was a game played with causation
13 Here's the deal with causation First of all, I
14 won't get into this nonsense about what the Surgeon
15 General said was association causation because
16 we've just -- we know absolute certainty is not
17 required anyway. So why should I chase that
18 will-o'-the-wisp

19 I will tell you that we spent a lot of
20 time on this silly stuff -- let me find it. I lost
21 it -- about causation where we went back and forth
22 about statistics and association and so forth and
23 so on.

24 All right. Give me five minutes and I'll
25 clear up all this stuff about causation. Just five

1 minutes. I lost that stupid thing I don't know
2 where it is All right Let's put on -- put on
3 48 Thanks. I'll find the other one

4 First of all, in 1954 or thereabouts,
5 this stuff comes out We have seen it a dozen
6 times This is billion-to-one stuff, billion
7 to one You don't get curves like this unless, you
8 know, something terrible is happening. And you
9 start quibbling The women didn't do -- women's
10 curves didn't look like this because they were --
11 because the women hadn't smoked long enough yet for
12 it to start looking like that This is billion to
13 one

14 And everything that you say about that to
15 disagree with it is a quibble So interestingly
16 enough, when this stuff came in the '50s there
17 wasn't much more to say except did cigarettes cause
18 -- did cancer cause cigarettes? And everyone says,
19 well, no, I guess not The rest of it was all the
20 same carping and moaning and complaining and
21 putting up a smoke screen and such stuff as that.

22 I was looking for -- oh, for my cause
23 criteria because I wanted to make sure I gave it to
24 you Here it is Thank you. It's 135. Found it,
25 all right.

1 Now, they kind of played a game
2 with Dr Pearl about cause, I think Well, first
3 Dr O'Hanley, who was befuddled, nothing made sense
4 to him The rats didn't get the cancer because it
5 was painted on their back

6 And I'm going to tell you how the DNA
7 test that the defense did back fired on them.
8 That's a real interesting little chapter. We must
9 have spent a whole day on the backfired DNA test
10 But back to the basics, because they want to
11 distract you on the bologna

12 Clinical causation according to
13 Dr Feingold, confirmed by Dr Yergin exposed to a
14 known carcinogen -- actually, in this case it's
15 plural. This is more than one carcinogen. Now,
16 we were able -- after being challenged to find
17 the carcinogen game, we were able to present some
18 pretty compelling evidence We even know what
19 carcinogen it is, or maybe That was an
20 interesting exercise

21 It turned out that probably the kind of
22 DNA damage Mr. Carter got was actually there had
23 been some scientists who had found that to occur
24 with these carcinogens we talked about. This NNN
25 and NNK, which is big time, bad scene, bad actors

1 inside Lucky Strikes and others.

2 So, you know, but that's just icing.
3 I mean, who knows, who knows with that brew of
4 carcinogens which part of the DNA it's going to
5 whack and how your cancer is going to look
6 exactly. We don't know We don't know that.
7 So what?

8 In this case, we darn well pinned it down
9 because their DNA test backfired on them And
10 I'll tell you about that Anyway, is exposed to
11 another carcinogen, develops a primary cancer in a
12 target organ known to be affected There you go
13 Exposed to a dose known to cause disease after a
14 reasonable latency Good-bye What is the issue
15 here? Proven that the sky is blue? Everybody
16 agreed

17 And even Dr. Pearl said, well, he
18 couldn't say. That's the best thing I got out
19 of all that stuff. Dr. Pearl said, I don't know.
20 And he went into scar cancer, peripheral all this
21 stuff. And when he got right down to it, he said,
22 I can't say it's due to smoking or not. So we mark
23 him out. He can't say

24 Dr. O'Hanley, nothing is caused by
25 anything. You mark him out. Dr. Thompson, he

1 didn't say anything Dr Feingold and Dr. Yergin
2 say absolutely the sky is blue So where are we?
3 Why did we take all that time? What are we doing
4 here?

5 162, lousy plate That's caused by
6 Mr Carter -- this is this bologna about what is a
7 cause, you know, for a point of view of their --
8 of the public health And they say statistical
9 methods cannot establish proof in an association
10 Yeah, okay, you are right

11 So this is from the '64 Surgeon General
12 Then they go on to say that causal significance
13 is a matter of judgment And they say it takes
14 these -- these things, consistency, strength,
15 specificity, temporal relationship, coherence
16 Big words. Kind of philosophy

17 Well, after saying that then they come
18 down and say lung cancer is caused by cigarettes.
19 That was the point. That was the point.

20 The '64 report, as if it needed any proof
21 in '64, said that lung cancer caused -- they used
22 that word. And they said, Yeah, we know it's not
23 just association We know that it meets all these
24 criteria; consistency, strength, specificity,
25 temporality, coherence, all these philosophical

1 terms. Meets it. All of our doctors agree.
2 Signed, sealed, delivered Good-bye. And that's
3 '64 That's 10 years, 12 years, 14 years after it
4 was -- the doctors were saying it in the medical
5 literature

6 And then we dragged them, took all this
7 time to go back over this stuff Is lung cancer
8 caused by cigarette smoking? Of course Who says
9 no? Only people hired by the cigarette company
10 That's it I could have brought the whole staff of
11 Memorial Medical Center in here and they would say
12 the same thing. They wouldn't go through this
13 philosophy. They would say of course South Miami
14 Hospital, they would say of course Of course.

15 You show me somebody who doesn't have
16 some other overwhelming thing, I mean -- and even
17 if he did, it would probably work in concert. I
18 mean, show me somebody that's been exposed to
19 asbestos all their life. They say, well, smoking
20 and asbestos maybe together. Show me somebody
21 who's been working in a uranium mine, they'll say,
22 well, both. Show me somebody with 65 pack years,
23 peripheral adenocarcinoma, what we expected, DNA
24 tests. I don't even care about all that other
25 stuff. I don't care about DNA either.

1 I'll get back to you how it backfired on
2 them But we didn't care It's bologna It's a
3 process to try and get you off the track, see you
4 confused And it's perfect because it's just
5 what they've been doing for years, what they did
6 back here Dissembling stuff, you know, saying
7 stuff that is somewhat true but is off the point

8 A neat thing, while I'm on it -- I hate
9 to ramble But remember that thing that said
10 why we are dropping the New York Times It's in
11 evidence It says, We are dropping the New York
12 Times because of the bum wrap This was from
13 American Tobacco.

14 And it says on there nobody has induced
15 lung cancer in mice, you know, by feeding them the
16 smoke That was like they were trying to justify
17 their position. It was '69 It was so late, so
18 late It was after all this stuff had been proven.

19 Well, I don't know if people had induced
20 lung cancer in mice by inhalation But the poor
21 little mice hide their noses and don't breathe the
22 smoke very well. And they don't live that long
23 anyway And you can't dose them enough. So who
24 cares. That's an example of like a distraction.

25 To publish something like that, that says

1 mice don't get cancer when they breathe and suggest
2 that that is, is -- that that means something is --
3 is a -- is deceit.

4 Because, actually, the mice were getting
5 cancer big time The mice were getting cancer that
6 were painted from '53 The mice were getting
7 cancer that were painted in Harrowgate in the
8 secret documents They got cancer. The mice got
9 cancer in experiments that the cigarette companies
10 did themselves when they were trying to figure out
11 how bad the cigarettes were They got cancer
12 then

13 So for them to come out and say the mice
14 don't get cancer when they breathe might be true
15 But it's totally meaningless, because that's not
16 how you give mice from cigarettes. Why did they
17 say that in the New York Times in 1969? That is a
18 real, real problem.

19 And, you know, you've got to judge a
20 chain by the weakest link. And if that's the kind
21 of stuff that's being said, you really got to
22 wonder what about the other stuff that you are not
23 so sure about. That's obviously wrong. That's
24 crazy stuff. That's insanity That's the loss of
25 perspective. That's divorcing yourself from the

1 world, you know, losing touch with reality

2 And American Tobacco lost touch with
3 reality about 1953 Never has come back To this
4 day, they haven't come back So maybe this is a
5 good process Maybe this is a good reality check
6 for everybody

7 All right. Back to where I was. Back to
8 the previous, please. Moving on through, because I
9 got too much to do Too much to do. Okay. I got
10 to talk about the statute of limitation. I got
11 talk about peripheral addiction and B&W concealment
12 and damages I don't know if I'm going to get it
13 in

14 Statute of limitation, I already told you
15 it's a trick defense The deal is Mr. Carter went
16 in to see Bruce Yergin in 1991 on the 5th of
17 February and he was told, You could have cancer.
18 But I need to give you the bronchoscopy. If you
19 think that that is the diagnosis, then Mr. Carter's
20 through and you can't give him any damages. He
21 loses.

22 But if you think it's reasonable to wait
23 until the pathology comes back, so you know what
24 you are dealing with, then his is not barred.
25 That's all I can tell you. If you look at your

1 notes you'll see, came back on the 14th and he
2 filed his case on the 11th, so that it would be
3 okay on the 14th But if you want to hold him to
4 the 5th, then you must tell him that he is not
5 entitled to anything

6 All right. Are you ready for peripheral
7 adenocarcinoma? I can't stand it I just can't
8 stand it Let's put -- let me find it I don't
9 know if I want to do it What's my time? How am I
10 doing on time?

11 MS STEIGER Fifty

12 MR WILNER Fifty I'm not going to do
13 it. Peripheral adenocarcinoma Let's see if I can
14 find the right plate. I'm sorry All right. It's
15 plate 69. What a game this is This is five
16 minutes

17 First of all, the Surgeon General and
18 everybody else says cancer is cancer -- lung
19 cancer. Lung cancer is all caused by cigarette
20 smoking. You got no other cause here. Secondly,
21 this thing shows what we are talking about.

22 More nonsmokers get adenocarcinoma than
23 do -- than they get other kinds of lung cancer.
24 That's those notes versus these notes. In females,
25 there are even more that get adenocarcinoma. See

1 that? I don't know why that is I don't know

2 Dr. Feingold talked about that It may
3 be that there is some -- that maybe some of those
4 are from other organs, you know Maybe some of
5 that is breast cancer that's misdiagnosed Heck, I
6 don't know. But that's not the point

7 Look at these. This is where the smokers
8 and ex-smokers get it. You stack these up compared
9 to that And then they want to say this is where
10 Mr. Carter belongs in here, not in here It's an
11 absurd argument Nobody believes it It's long
12 gone It's finished It's over with.

13 Now, Dr Pearl said, Hey, wait a minute,
14 he said I don't agree -- I don't know that I
15 understand the mechanism, the mechanism of how
16 peripheral adenocarcinoma forms down there. I
17 really don't know how I understand it.

18 So let's get back to that. I've got one
19 of these really messy charts here for what that
20 all is about. And I'll give it to you in a
21 minute I think that was probably it.

22 Auerbach. Yeah, remember that? So we
23 got into a whole thing with this where Dr Pearl,
24 who is not really an expert in cigarette-induced
25 cancer at all. He was just kind of chosen to come

1 out of the pathology department down there in
2 Orlando. Hasn't got really a lot of training
3 And he came up here without much in his hands.
4 Well, okay Dr Pearl Nice guy

5 He says, Well, now that I have studied
6 it, I know this particular model applies to cancer
7 in the big airways But I just don't know how the
8 lung cancer could form further out in the lung.
9 I don't know why he didn't know He should have
10 known It's been published It's been published
11 for years

12 So he led me and I took the bait My
13 fault. I took the bait to go through all this hard
14 science to prove -- hoping maybe he would just say,
15 You are right, you know, I didn't know it. You are
16 right. But he never did But so what. Maybe I
17 wasted a lot of time Who knows

18 But anyway, the point of all this matter
19 is, if anybody cares, is that, sure, there is
20 different carcinogens in cigarette smoke We all
21 know that There is something called the aromatic
22 hydrocarbons And that has been linked to these
23 cancers that occur in the big airways. Fine and
24 dandy.

25 We also know now there are also these

1 tobacco specific nitrosamines. These are the
2 killers, NNN and NNK. And these have been linked
3 to peripheral adenocarcinoma. And it's no big
4 deal I mean, you know, one day maybe we will find
5 exactly the molecule Right now, we know that
6 people who smoke get peripheral adenocarcinoma.

7 Oh, okay Let me clear this They were
8 talking about this. Remember, the majority of
9 adenocarcinomas are peripheral. The majority are.
10 So this has got -- this includes Grady Carter's
11 cancer This includes peripheral adenocarcinoma
12 Dr Feingold explained that the majority are
13 peripheral -- there is nothing weird about that

14 He said, Well, wait a minute. There is
15 another kind of cancer called bronchi alveolar
16 cancer. What about that? Mr Carter didn't have
17 that kind of cancer Some -- it gets so
18 confusing I hardly have time to explain it.

19 But some pathologists link this other
20 kind, which Mr. Carter doesn't have, as an
21 adenocarcinoma. And some don't consider it
22 adeno. And I don't care whether they consider it
23 adenocarcinoma or not, because he didn't have it.

24 This includes the peripheral
25 adenocarcinoma that Mr Carter had. No one

1 disagrees with this And it speaks for itself.

2 So how do you unmuddy water, you know?

3 When water gets mud in it, it takes longer to get
4 it in than it did to spoon it in there This is
5 spooning it in

6 And poor Dr Pearl, I mean, I considered
7 that Dr Pearl had never seen this before and
8 scurried around over the weekend to try to get his
9 thoughts together Compare that to what you got,
10 the blue ribbon stuff, from Dr Feingold, who was
11 willing to share with you the stuff that he did and
12 made a part of his life, you know, a part of his
13 life. This was a part of his life This -- the
14 research on this issue was a part of his life and
15 he shared that with us And I think that that was
16 a good thing that he did that

17 Anyway, this was -- this was garbage.
18 Interesting theory about how the nitrosamines
19 attack the periphery of the lung and how, in fact,
20 there is a plate in there showing that they
21 actually break the DNA. They have taken it out
22 of the periphery of the lung and they digested it.
23 And they find these same breaks. These same what
24 they call the DNA adducts that they can get from
25 this nitrosamine when they experiment with animals,

1 because animals share a lot of DNA.

2 Let's not get into this business, mice
3 aren't men What are we going to do? Test
4 people? Start giving them shots of nitrosamines?
5 Not likely You know, it's so hilarious. American
6 Tobacco before the famous Wynder/Graham mouse
7 painting experiment in 1953, the industry -- after
8 -- after the epidemiologic studies had come out in
9 1950, they said doesn't prove anything, not tested
10 in animals.

11 1953, they painted the mice. The mice
12 got cancer You know what they said then? Mice
13 aren't men Ah-ha, you can't win You just can't
14 win, because the mice aren't men. And that's
15 true And they have to be painted with more
16 because they only live so long They don't live
17 very long

18 So if you are going to make it a
19 meaningful experiment they've got to get the cancer
20 before they die of old age, which in a mouse isn't
21 very long So anyway, you -- of course, that's the
22 laboratory technique for describing that.

23 What is the laboratory for people? It's
24 the world. In fact, unfortunately because of Lucky
25 Strikes we're all mice, at least the people who

1 bought these products They became the mice.
2 Grady Carter is the mouse, in a sense And his
3 death, if he dies from a cigarette-related cause,
4 will be just like the mice that you saw I mean,
5 that's the unfortunate way.

6 And that's how we tally up the
7 epidemiology that was done is really just
8 unfortunately counting the people who were treated
9 like the mice, who bought the product and died.
10 And that caused that huge rise in lung cancer So,
11 you know, you can play games all you want with mice
12 aren't men, but that isn't right. 1152 -- 1153.

13 MS STEIGER One hour

14 MR WILNER One hour, okay Faster,
15 faster Not back into this, but this is that same
16 paper that Dr Pearl relied on where he said, Oh,
17 scar cancers What a confusing mess that turned
18 out to be It turns out that scar cancers actually
19 produce their scars And he said, Yeah, that's
20 right, they do.

21 Then he said, Well, I think this scar may
22 be older. Of course, I don't know how old the
23 tumor was. The tumor could have been ten years
24 old, so part of the scarring could have been from
25 that Anyway, when we got all down to it, he said,

1 I don't know if the scar was caused by the tumor or
2 the tumor caused the scar

3 But I have this paper which says they
4 counted scar carcinomas. They didn't think it was
5 due to smoking But when we looked at the paper,
6 the same paper, only 10 out of 505 people were
7 nonsmokers. So -- and, again, one paper, whatever
8 you made of it, is not the same as as this When
9 Dr Pearl comes in with one paper, I think you are
10 entitled to really -- really wonder what is going
11 on

12 I mean, I don't know If that paper were
13 so important, why didn't they ask Dr Feingold
14 about it? I mean, let's have it out Let's rock
15 and roll Let's get to the bottom of it. Instead
16 they wanted to ask Dr. Pearl, they said, Oh, there
17 is one paper that says scar cancer. But actually
18 it doesn't even really say it But who knows.
19 Doubt, doubt, doubt I doubt it I doubt it.

20 But then when he got down to it, he said,
21 Well, I don't know. I don't know. I can't say.
22 Good for him Okay. Is that peripheral
23 adenocarcinoma? It will have to do for now.

24 DNA, the test that backfired. Well, I
25 have to tell you that certainly the plaintiffs did

1 not perform any DNA analysis on Mr. Carter That
2 was something that was done by Brown & Williamson.
3 And interestingly enough, this was a fascinating
4 thing I mean, this could be its own book. This
5 was so great So great

6 Here is what happened I can't wait to
7 tell you I'll find it That's the adeno, billion
8 to one K-ras G to T, TA. Remember all this
9 stuff?. Okay Here is what happened. The
10 defendant's got Mr Carter's tissues from his
11 pathology, sent it over to some lab to have it DNA
12 tested. I don't know why. Because, really, there
13 is so many possible mutations from cigarette smoke
14 that, you know, there really isn't one way -- there
15 isn't one mutation that you look for. There is
16 zillions and the genes are all matched So I don't
17 think it matters

18 But anyway, they had it tested. And they
19 found out to -- unbelievably, that it had a darn
20 mutation in it It had this K-ras mutation, which
21 was a part of the DNA which was broken. And
22 unbelievably -- so they said, Well, what are we
23 going to do with that? You know, they had Dr's
24 -- Dr. Feingold and my book, which was written
25 mainly about asbestos but has a chapter on

1 cigarette smoking, which is in evidence It's
2 actually in evidence And you'll, you know, I hope
3 you enjoy it

4 But anyway, it says -- it says under
5 cigarette smoking, it goes into some of this
6 genetic stuff, which really the issue here was is
7 there a plausible molecular basis that scientists
8 are working on? Not what Grady Carter's was, but
9 how -- it's kind of a theoretical issue about, you
10 know, how cigarettes actually break the DNA.

11 Okay This is in evidence And it says
12 like -- it says mutations in the K-ras gene
13 prevalent in current and ex-smokers -- are
14 prevalent in current and ex-smokers with
15 adenocarcinoma and uncommon in never-smoking
16 adenocarcinoma patients So, I mean, the trail is
17 hot The trial is hot here.

18 But not -- I mean, it wouldn't matter if
19 it weren't there. We didn't care. But the trail
20 is hot. By God, they found it They found it
21 right sort of where we said But then they said,
22 Oh, we are going to fool Wilner. We got it in this
23 kind of G to T. He says in his book it's going to
24 be G to T. Well, actually what it said here is
25 that the mutation found by this one paper was G

1 to T, the specific type of mutation induced by the
2 benzopyrene, which is the one kind of carcinogen.
3 That was the G to T

4 And they said, Oh, we are going to stick
5 it to him because actually what we found in
6 Mr Carter was the G to A And how is Mr. Wilner
7 going to explain that? Well, unfortunately they
8 didn't do their research They didn't look at
9 the next set of papers, which show that these
10 nitrosamines -- not the benzopyrene, but the other
11 side of the witch's brew of this stuff hits you at
12 the G to A and causes just what they found

13 And we went around and around And poor
14 Dr O'Hanley hadn't seen any of that stuff And
15 maybe it took too long But how incredible that
16 their test should backfire so perfectly when we
17 didn't even do it. So their nitrosamines in their
18 Lucky Strike cigarettes, which incidentally are
19 much higher than the nonfiltered cigarettes.
20 We put that chart in. They go up to very high
21 numbers. They do G to A damage, gene damage in
22 the K-ras gene of Grady Carter.

23 And, boy, beyond that you can't go with
24 that because that is really -- that's really
25 getting close, you know. That is so close. Above

1 and beyond, that's the 99 percent that we only had
2 to prove 51 And it was fortuitous. It just
3 happened I mean, we didn't set it up They came
4 in and said this and it turns out that they were
5 wrong And they didn't even know it I got to
6 move faster Oh, God, all right

7 So you say that's all proven That's all
8 proven, forget that You say, Wilner, you got to
9 tell me about a couple of other things real fast.
10 Fast as fast can be

11 One is what about this business where you
12 are saying he smoked Lucky Strike from one year to
13 another and then smoked another cigarette What
14 are we supposed to do with that? Well, there is
15 nothing on the verdict form about that, that other
16 smoking of Tareytons is not on the verdict form.

17 If it were on the verdict form, you would
18 be asked to do something with it. But it's not.
19 So this is one of these things where you just like
20 got to say, okay, I'm going to follow the law.
21 Whatever. Is this another trial? Is this another
22 deal. Who knows. It's not here. It's not for
23 us.

24 So you say, Well, wait a minute, though.
25 He wouldn't have gotten his cancer if he hadn't

1 have smoked those two Nobody knows. Well, his
2 chance of getting his cancer would be less if he
3 hadn't have smoked from '72, of course Why not?
4 I never disputed that, of course So what? It has
5 nothing to do with it

6 The point, point is both caused it How
7 do I say that? If you started in '72 and smoked 19
8 years to 1991, very rare. Why do I say that?
9 Because if you start at -- most people start
10 smoking at 17 or 18, 16 sometimes People don't
11 get lung cancer at age 34 or 35 It doesn't
12 happen Oh, once in a blue moon

13 But I'm talking -- all we can talk
14 about this stuff is probability Now, when we are
15 talking probabilities it's all speculation, but
16 anyway. People don't get lung cancer in 19 years.
17 Doesn't happen.

18 So why does that matter? I'm just saying
19 that there is no question that the Lucky Strike is
20 the initiator probably of those mutational events
21 that we saw. We will never know exactly. This was
22 required to initiate part of that time -- actually,
23 five to ten years is when the cancer is actually
24 growing unseen in his body. But this time was
25 required to initiate.

1 And you know what? There is also some
2 mention, and Dr. Pearl agreed, that the mutations
3 that we saw were irreversible and occurred early.
4 Early and irreversible mutations And we talked
5 about these in here Long before Grady Carter's
6 was known, it was suggested that the DNA mutations,
7 which are unknown in an individual case -- except
8 we happen to find them here -- that they are early
9 and irreversible

10 And they are -- they almost certainly
11 occur sometime in here And they stay around for
12 a long time And when the -- when the conditions
13 are right they get you

14 Okay, enough on that. So this is
15 bologna. You are asked to decide whether Lucky
16 Strike was a cause. We just showed that a cause
17 doesn't have to be the only cause And we agree
18 this can be a cause as well We don't care.
19 That's not in this case The question is here.

20 Addiction. What a subject. Talk about
21 philosophy. You know this business of brain and
22 body. Does the brain control what you do or does
23 the mind control what you do? I don't know. I
24 don't know. No one can solve that problem.

25 We never say -- we will not say, have

1 never said, strung out if we did, strung-out
2 argument that addiction to nicotine makes you into
3 a zombie. It means you just walk through walls and
4 you can't control yourself No, it's not.

5 It does something to you, though. And
6 that's what they didn't want to admit And, you
7 know, the more that we have learned about the
8 stuff, the more powerful, the more -- the more
9 powerful it seems like it is This nicotine
10 business is a bad deal when it gets inside your
11 brain

12 I want to show you that plate again,
13 which is so neat, that I like so much Here it
14 is It's plate 1143 Why did I get all the way
15 into this brain chemistry? Only to demonstrate
16 that you can't look at this problem by one side or
17 the other completely

18 Dr Thompson wanted to say it's all
19 behavior He wanted to say that just -- we can't
20 -- he refused to really come to terms with what is
21 going on when the nicotine molecule goes inside the
22 brain. He wanted to say, well, what difference
23 does it make? Basically, it's -- it's just -- you
24 decide.

25 Well, that view prevailed That was an

1 important view in the 19th century really. People
2 didn't know why people did things As I said,
3 they used to think the heart is what controlled
4 it But then they started to figure, no, no, there
5 is something going on here

6 You remember all those definitions of
7 addiction? Dr Thompson wanted to use a 1964
8 definition, which requires intoxication I don't
9 know why he wants to stick in 1954 -- '64.
10 Everybody else has moved on Why have they
11 moved on? Because they realize it doesn't take
12 intoxication to effect your brain And I made
13 a big point about this before

14 It doesn't take intoxication to fool with
15 your brain If that -- what is it, this is your
16 brain on drugs and so forth? Well, if that's your
17 brain, there's one to way to affect it by just
18 getting drunk and having the whole brain kind blown
19 out And that's the intoxication deal And that
20 affects the decision part of your brain And
21 that's the old thinking, that that was the only
22 way to do it.

23 But now it's understood that nicotine can
24 affect the brain kind of through the back door.
25 You don't have to blow out drunk. It gets into

1 your brain and affects the decision-making
2 apparatus The part of your brain that's doing
3 some deciding

4 Well, I don't know exactly where But I
5 know that it happens to people Why else do people
6 act like they do? Why else would people act --
7 have so much problems with cigarettes? Why do they
8 have these problems?

9 I want to talk about that some more,
10 too These are nicotine receptors in the brains of
11 smokers and nonsmokers And I maintain, I suggest
12 that this represents something that Mr Thompson
13 -- Dr Thompson refused to acknowledge

14 This is discomfort This is
15 unhappiness This is pain This is something
16 tugging at the inside of your brain that won't let
17 go. These things have grown inside your brain by
18 virtue of your taking the drug. And whether
19 they ever go away or not, I don't know. Maybe
20 eventually they do. But it takes a long time
21 once you grow a good crop of them. When they're
22 empty and they don't have nicotine, they hurt.

23 How much pain can you take? Who knows?
24 What is the limit of a human? How much should we
25 expect of a person? That's a good point.

1 I think that whatever you'd expect, you
2 have to look at Grady Carter and you'd have to say,
3 was this a good man? Was this a strong man? Why
4 did he end up like this? Why did he end up with
5 half a lung? Was he a bad man or was he involved
6 with a bad product? Really an interesting thing to
7 think about it.

8 What about when the death rate went sky
9 high for cancer Were all those people bad
10 people? All of a sudden people changed and they
11 became bad people or was there a product that was
12 introduced to them that was a bad product?

13 Why are people who are in complete
14 control of their lives like Mr. Carter, an air
15 traffic controller -- probably if you'd flown into
16 Jacksonville during the time he was operating --
17 he was working he talked to the pilot, guided you
18 safely down. Maybe Maybe so

19 Why is it that people end up like this,
20 so many people? Because they just can't make up
21 their mind or because there is something happening
22 to them?

23 Well, you heard all the evidence about
24 what is going on. And there is no question There
25 is no question at all. This isn't made-up stuff.

1 Feingold even -- it isn't Wynder, Feingold It's
2 the Surgeon General of the United States. It's
3 nicotine addiction It's serious. It's been
4 discussed in detail It affects your brain And
5 how much effect does it do? There's no way that
6 anyone can tell except you just listen -- you
7 listen to Mr Carter and you makeup your mind how
8 much pain has he been through. How much pain has
9 he been through?

10 He's not being blamed for cigarette
11 smoking There is no assumption of risk. It's
12 just a question of -- for his claim of addiction.
13 He makes a claim How much pain has he been
14 through that he really didn't bargain for? Because
15 there is never been any suggestion, package labels
16 or anything else that we were dealing with an
17 addictive drug until recently.

18 Okay I've got a few minutes. And I've
19 got to talk to you about damages, so let me see if
20 I can find that Let's put the verdict form back
21 up. Back page Take a second here, just breathe
22 hard -- breathe easy.

23 Now, I mentioned before, this is probably
24 the hardest area that we have discussed. How much
25 time do I have? Hour fifteen, okay. I tell you

1 what I'm going to save this for last I want to
2 do one other thing Put on 180, 180.

3 I want to talk to you about damages.
4 First I've got to talk to you about one other
5 thing This is -- there is one window that we
6 have into the inside of what people in the industry
7 were thinking and doing in 1963 or thereabouts
8 This was well after they -- the evidence had
9 been compelling that smoking was causing serious
10 problems but long before addiction raised its ugly
11 head in 1988

12 This was right before the Surgeon General
13 of '64 This was a really important time And I
14 want to make some points about -- I want you to
15 read this letter, if you get a chance. It's in
16 evidence It's July 17, 1963. It's by Addison
17 Yeaman, who was the executive vice president
18 of Brown & Williamson Tobacco Company.

19 And he says, basically, they're worried
20 about a lot of things They're worried about the
21 Surgeon General's report is going to come out and
22 it's going to say cancer For those of us who -- I
23 mean, to look a little behind the scenes, you have
24 to look down here and say -- it says, Certainly,
25 one would hope to prove there is no etiologic,

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1 which means causal, factor in smoke. But the odds
2 are greatly against success in that effort. So
3 they knew.

4 The odds were that they weren't ever
5 going to be able to get their product off, to
6 prove that there was -- that their product wasn't
7 dangerous To even think that they were this late
8 in 1963 still dreaming about somehow getting their
9 product off the hook was crazy

10 But even now they're sitting around
11 dreaming saying, well, maybe. But, no, the odds
12 are against it We are going to find that it's got
13 -- it causes cancer We know it does And we will
14 never find that it doesn't.

15 Next. So also they're involved -- I'm
16 sorry. Flip to the previous one I didn't finish
17 it. Also, very interesting from here you will see
18 they're involved with Dr. Griffis filters. You'll
19 hear more about filters, I guess There have been
20 Strickland filters and this filter and that
21 filter. And we are not saying you can filter out
22 everything absolutely, but you have a duty to
23 develop. You have a duty to test. You have a duty
24 to work on it.

25 Where is the evidence it was ever done

1 with Lucky Strike cigarettes? They left that
2 product on the market without change up until
3 19-, whenever, in '72, when Mr Carter stopped
4 smoking it and never made the first inkling of
5 improvement

6 Now, to say, well, we made some other
7 cigarette which was better, that's like saying,
8 hey, your -- you know, your car -- I'm sorry, sir,
9 your brakes are lousy But if you'd bought another
10 car you might be safe That's not a duty that a
11 manufacturer owes a consumer under the law He
12 can't just say go buy something else

13 And there is no claim that Grady Carter
14 should have bought anything else They market
15 those cigarettes, they got to stand behind them.
16 You don't let a cancer causing thing go out there
17 and say, well, there might have been another one
18 We put a good filter on Well, why? Why?

19 Okay. Anyway, it talks about the Griffis
20 filter And he says it could -- you know, maybe
21 it's really going to be able to do it. Deliver the
22 taste of nicotine, even more effective form, free
23 of constituents, constituent number one -- that's
24 what they were worried about in cancer. Are
25 grossly overstated, blah, blah, blah. Okay. So

1 they know about this

2 Now, let's go to the next page And, in
3 fact, go all the way to page -- to page -- bear
4 with me To page 180(b) Why was there reluctance
5 about the filters by Brown & Williamson and by
6 anyone else who had access to this technology? I
7 suggest it's because of this

8 And it's a little hard to read. I want
9 you to take the time to read it when you get a
10 chance First they say maybe, Well, we should
11 issue a warning This is '63, long before '66 when
12 they were made to issue a warning

13 I don't think they should be tarred and
14 feathered, but I suggest the industry might serve
15 itself on several fronts if it voluntary adopted a
16 package label, such as excessive use may be
17 injurious to health. It would embody this legend.

18 He says, This is so controversial a
19 suggestion, indeed shocking, that I would rather
20 not anticipate the arguments against it. It still
21 was shocking in 1963. It should have been on in
22 1953 and they're still mulling it over in 1963.
23 Befuddled.

24 It's difficult to assess the effect of
25 the report -- that's the upcoming Surgeon General's

1 report -- on causative action, he means litigation,
2 arising prior to the issuance. Logically, it
3 would be argued the report does more than to
4 collate preexisting knowledge -- knowledge
5 available to the buyer -- of the seller

6 But logic might, in the minds of a jury,
7 yield to emotional reactions That if this
8 knowledge was available to the seller, this is
9 their -- this is the executive vice president
10 It was up to him -- meaning the seller. It was
11 up to him having the means to do so to make the
12 product safe That's the key

13 They were afraid to really come and push
14 these product improvements because they were afraid
15 that later people would come back and say, You
16 could have made the product safe and you didn't.
17 A jury might, whether instructed or not, operate on
18 the theory of comparative negligence.

19 True The buyer was negligent in smoking
20 a product he knew he was dangerous. But he was
21 lulled by the seller and the seller's negligence
22 was the greater in failing to make his product
23 safe

24 That is what they were thinking in 1963
25 in the boardrooms of Brown & Williamson. I submit

1 to you that's what they were thinking in the
2 boardrooms of American Tobacco. I submit to you
3 they knew all along that this was coming And they
4 didn't want to come out and say, Okay, we will make
5 our product safe because they knew that, if they
6 did, somebody then would come along and say, Look,
7 you had the means to do it And why didn't you do
8 it? So really it took a long time. It took 30
9 years.

10 Next, next page 180(c) The real
11 bombshell out of this, of course, was that known to
12 the boardroom inside Brown & Williamson, also
13 knowable by American Tobacco, was this discussion
14 of the brain effects of nicotine, the Hippo study.
15 This is a whole quote from Battelle, which you
16 remember was Hippo, coming down to the conclusion
17 from the executive vice president that they're in
18 the business of selling nicotine, an addictive
19 drug. That's their business And it's good
20 business

21 Do you inhale? You bet. We do inhale
22 because it's good business. We want our people to
23 inhale. We want our people to smoke cigarettes.
24 We want them to smoke as much as they can. That's
25 what Dr. -- that's what Mr. Heimann said. Smoke it

1 all up, smoke the next pack and keep going because
2 it's good for our business

3 It would have been a bombshell to
4 announce this It really would I mean, the whole
5 idea that people are being drugged when they get
6 these cigarettes, that the manufacturer believed
7 it all along, that's incredible It's just
8 incredible.

9 And it's completely separate from
10 anything else that this -- that we have proven.
11 I mean, even without that, the -- this incredible
12 organization of proof that these products were
13 deadly and the lack of the slightest, the slightest
14 concern for the well -- for the well-being of the
15 consumer. Damned them and it damns them now

16 Right Now I'll talk about damages and
17 we will be done until I can sit -- come back up
18 for the next few minutes. So you say, Mr. Wilner,
19 look, I think you did prove your case and so what
20 do you -- what are you here for? What is the --
21 what are you seeking?

22 And I have an obligation to tell you.
23 Although if I tell you, you are going to put --
24 456, please. If I tell you -- thank you.

25 Some will say, Well, Mr. Wilner,

1 you asked for a lot Others will say, Well,
2 Mr Wilner, you disappointed me You didn't ask
3 for enough So I have to say, Let's base this on
4 some reality Mr Carter, is it too much or too
5 little? I hope I don't know. May be too
6 little

7 You are entitled to award on past and
8 future pain, suffering, anxiety, anguish and any
9 other things that His Honor instructs you. In the
10 past, there is been the anxiety of diagnosis, the
11 pain of surgery, the loss of part of his body

12 You know, Mr Carter is not the kind of
13 guy hospital going to get up here and complain to
14 you He's an understated guy He's a little
15 embarrassed to talk about this stuff And so we
16 are not pushing this We don't think this is --
17 this is something that we want to, you know, make
18 into anything that we stand up here and go on
19 about, words and suffering and all this stuff.

20 You saw him You think about it. That's
21 all I mean, that's all we can do. You think
22 about the day when you are told that you've got a
23 disease that probably isn't curable. You think
24 about, you know, sometimes it's a lot -- sometimes
25 you think, Well, if it's only one day of my life I

1 can go through anything

2 Think about what it's like to be told
3 where you -- they're going to do surgery and
4 they're going to decide if it's spread. And if it
5 did, well, they're going to just sew you up again
6 and not do anything. I think that's -- I think
7 it's something to think about That's all.

8 Five years of fear the cancer would come
9 back. And I call it the brain pain of addiction,
10 which you can -- I don't know how to put a value on
11 it But I suggest that past pain and suffering is
12 worth \$600,000 I think the future is worth --
13 he's lost by Dr Feingold's analysis he's lost six
14 to seven years of life expectancy He needs
15 medical monitoring And I think that's worth
16 something like \$400,000.

17 I think Millie Carter has been through a
18 lot. I think her damages may be something like a
19 half of Mr. Carter's. And I suggest that that
20 figure of 1,500,000 -- and I say that some will say
21 that that's too large. Some will say that's not
22 anything large enough for what we are talking
23 about

24 I also suggest that -- is Mr Carter's
25 suffering mentally, has it been alleviated by this

1 process? Has it been fixed somewhat? In other
2 words, is he better because he gets up here and
3 tells his story and says, Yeah, I smoked
4 cigarettes, of course, you know He didn't try to
5 shirt that He didn't try to make-believe he was
6 -- you know, somebody made him He got up here
7 like a man and stood up here Does that help?
8 You are entitled to consider that

9 Also, you are entitled to consider how
10 much is his anguish increased by hearing today from
11 Brown & Williamson Tobacco Company today, this very
12 day they are continuing the same deception that
13 they did for years by being able to announce -- by
14 announcing to this court and this jury cigarette
15 smoking does not cause disease

16 In a totally isolated -- a completely
17 fabricated position, hanging on to something that
18 they were wrong in 1941. They were wrong in 1953.
19 They were wrong again in 1964 They were wrong
20 again in 1969 when they announced to the New York
21 Times They were wrong again and they -- they are
22 still wrong today

23 So how much does that increase his mental
24 anguish? That's completely up to you. That's
25 completely up to you to decide. I'm going to

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1 sit down now and visit with you again in a few
2 minutes

3 But I suggest that we consider that the
4 case is not too big and it's not too small. That
5 social change is appropriate and sometimes comes
6 from forms like these, from juries just like
7 yourself. That the issues in the case are defined
8 by the verdict form and the jury instruction. That
9 we have proven our case well beyond what anybody
10 can be expected to prove to the 99th percentile.

11 We proved DNA, even though we didn't
12 expect to We proved carcinogen We proved
13 causation We proved negligence. And that it's
14 the best thing that could happen that somebody --
15 that this jury be asked to decide these issues at
16 this time Thank you

17 THE COURT Thank you, Mr. Wilner. Lady
18 and Gentlemen, we are going to take a mid-morning
19 break at this time and stand in recess until ten
20 a.m.

21 THE BAILIFF: All rise. This court is
22 recessed until 10 a.m. by this clock.

23 (Recess taken).

24 (Side-bar conference held)

25 THE COURT. All right. Mr. Maxwell.

1 MR PRICHARD: Your Honor, I asked for
2 this meeting Your Honor, we would ask -- first,
3 we object to the last slide that was on the board
4 at the very end of Mr Maxwell's argument

5 It contained, number one, a claim for
6 improper elements of damages that has not been part
7 of this case, and that is his medical monitoring.

8 THE COURT: His what?

9 MR PRICHARD Medical monitoring.
10 Two to \$3,000 a year that was on the plate and
11 Mr Wilner put up there and argued. I think those
12 elements of damage were removed by stipulation in
13 this case.

14 And it's improper to plant that seed in
15 the jury. And we'd ask a curative instruction be
16 given they're not to consider that. It's not on
17 the verdict form. It's not in the instructions.
18 It happened right here at the end.

19 Secondly, Your Honor, I would ask that
20 because of the indecision at this point of the jury
21 instruction that was at issue this morning -- the
22 jury has seen one version of that. And without
23 that version being approved by the Court -- and it
24 had to do with the duty to test in this situation.

25 THE COURT: Hold your thought for a

1 moment, Mr. Maxwell (sic).

2 (Pause)

3 THE COURT. All right

4 MR PRICHARD Finally, Your Honor, with
5 respect to that, if at some point you have reached
6 clarification on your thinking on that instruction,
7 we would appreciate being advised of that fact
8 simply because perhaps we can address that in our
9 argument as to what the proper statement of the law
10 will ultimately be

11 Finally, I would request, Your Honor,
12 that the overhead slide that contained the improper
13 elements that Mr Wilner put up on the board in
14 front of the jury right at the end of his argument
15 be attached as an identification exhibit to this
16 trial for future purposes.

17 I'm talking about the one with the
18 rambling and the 1 5 million on it and all that.

19 THE COURT. All right. I'll require that
20 that overhead or positive or that the original --
21 not necessarily the acetate be attached to the
22 record.

23 And I will at the beginning of
24 Mr. Sheffler's argument remind the jury that what
25 the attorneys say is not the law. I think the

1 instruction I gave them initially was that it
2 wasn't evidence I didn't mention that it wasn't
3 the law. I'll add that provision And I think
4 that will, at least for my purposes, cure what
5 concerns you have

6 MR PRICHARD Your Honor, in that event
7 then, absent -- I'm sorry.

8 THE COURT And the other point, I have
9 not yet made a decision with regard to the one jury
10 instruction that's been requested.

11 MR PRICHARD Your Honor, in light of
12 Your Honor's thinking and ruling with respect to
13 the type of curative instruction that you are going
14 to give just before our lawyer stands up to give
15 his argument, I would request perhaps that be given
16 at the end rather than at the beginning.

17 And I would move for a mistrial on the
18 basis of improper elements injected in front of
19 the jury without a specific curative instruction
20 directed to those elements. It has put a skunk in
21 the jury box that we can't get out.

22 THE COURT: I'll deny the motion for
23 mistrial. And, as I understand it, in light of my
24 denial you request that I give curative instruction
25 at the conclusion of all of the arguments?

1 MR. PRICHARD Yes, Your Honor, just so
2 it's clear. The curative instruction that you
3 suggested, which is the standard, I would prefer
4 that be at the end rather than --

5 THE COURT I don't mind giving it at the
6 end

7 MR PRICHARD I hope it's clear on the
8 record the type of curative instruction that we did
9 request and we are -- we asked for with respect to
10 the improper elements of damage

11 THE COURT I hope it's clear as well.
12 My understanding of what you have said is such that
13 I'm not going to give an instruction other than I
14 have indicated on the record

15 MR WILNER Could I just mention
16 something? I don't understand why you think the
17 medical monitoring isn't proper.

18 MR. PRICHARD: You have no tangible
19 elements of damages that you put in this case.
20 That's why. Economic damages you plan to put in
21 this case, that's what we were told all along.

22 MR WILNER: What do you mean? You've
23 been told I'm honestly at a loss. I know
24 Dr. Yergin testified he needed medical monitoring
25 and gave a figure for it I didn't think there was

1 anything objectionable about that.

2 MR PRICHARD The problem is there is
3 no claim by your view in this case for tangible
4 elements of damage There is nothing on the
5 verdict form that addresses that

6 And now to inject that as something
7 that's there in front of the jury is what I think
8 the problem is, Woody.

9 MR. WILNER We think there is, so I
10 guess we can take that up Okay.

11 THE COURT Thank you.

12 (Side-bar conference concluded and recess
13 taken)

14 (Change of reporters)
15
16
17
18
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24
25

1 Thursday, August 8, 1996

10:07 a m

2 THE CLERK: All rise This court is again
3 in session Be seated, please

4 THE COURT: Mr Sheffler.

5 MR SHEFFLER Yes, Your Honor.

6 THE COURT. Are you ready to proceed?

7 MR. SHEFFLER Yes, Your Honor.

8 THE COURT: Mr. Forte, bring the jury in,
9 please.

10 (Jury enters at 10:08 a m.)

11 THE COURT Please be seated.

12 Mr Sheffler, closing argument for the defendant.

13 MR SHEFFLER Thank you May it please
14 the Court

15 THE COURT: Yes, sir.

16 MR. SHEFFLER: Mr and Mrs Carter,
17 counsel, lady and gentlemen of the jury. We've had
18 a long and sometimes arduous couple of weeks. We're
19 nearing a close, and I want to specifically say that
20 I appreciate the time that you spent in this matter,
21 the attention you've given it, and I'm speaking not
22 only for myself, I'm speaking for Mr. Prichard,
23 Mr Riley, and Ms. Stinnett, our company
24 representative, the representative of Brown and
25 Williamson.

1 We know that this is a difficult thing
2 taking time away from your business, your
3 recreation, whatever, and come here, but it's an
4 important thing to us This is an important issue.
5 These issues are important to all of us, and we do
6 appreciate your close attention

7 Now, this is my chance to get to tell you
8 a little bit about what the laws are that the judge
9 will instruct you on soon and how the evidence that
10 you've heard during the trial applies to those laws
11 in determining whether Mr Carter -- Mr Carter's
12 claim that he should be compensated money by the
13 American Tobacco Company for smoking cigarettes
14 We're going to address that I'm going to go
15 through those claims with you.

16 I'm going to go through the evidence that
17 you heard throughout the course of this trial. Some
18 of that evidence was complex and complicated,
19 especially some of the stuff about DNA adducts and G
20 to A versus G to T transitions versus transversions.
21 We will have to address it because it's part of
22 causation, it's part of this case

23 There is no attempt here to make anybody a
24 molecular biologist. Obviously it is complicated.
25 I think you can get the point -- Mr. Wilner didn't

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1 -- but I think you can. We'll go through that and
2 see how it works.

3 We'll also talk about the primary issue in
4 the case quite a bit, and that is Mr Carter's claim
5 that he was damaged, he was injured, as a result of
6 a failure to warn That is the principal claim
7 Very straightforward issue.

8 He says if a warning had been given by the
9 American Tobacco Company before 1969 he would have
10 avoided his cancer. He would have quit smoking.
11 We're going to look at the evidence of that in
12 detail because that is what this whole case has
13 really been about

14 It's not a cause about philosophy.
15 Mr. Wilner is talking about philosophical
16 differences between brain and man and mind and heart
17 and things about whether or not we're too big or too
18 small. This case is not about any of that

19 This case is about Mr. Carter, Grady
20 Carter. His decisions, his choices, why he made
21 them; why he didn't. The case is not about whether
22 cigarettes are good or bad. The case is not about
23 whether cigarettes should be sold or not sold.
24 That's really not this case. This case is about
25 Mr. Carter's decisions and why he made them. That's

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1 why we put all this evidence on, and that's what
2 we're going to review

3 Now, one of the claims I want to dismiss
4 right up front though is something Mr. Wilner was
5 talking about towards the end of his argument, and
6 that's this idea that there was some way to make
7 cigarettes differently or we should have made
8 cigarettes this way or that way, filters or
9 unfilters

10 And I don't want you to be confused,
11 because as Your Honor will instruct you, to have a
12 claim that you should have made your product in a
13 different design, to have a design defect claim, his
14 Honor will instruct you that you must show two
15 things. You must show two things Plaintiff must
16 prove that whether the alleged injuries Plaintiff
17 Grady Carter sustained as a result of the challenged
18 design for Lucky Strike, that's the nonfiltered
19 cigarette, would have been avoided or would have --
20 or less severe had the American Tobacco Company used
21 a feasible and available alternative design.

22 They have to prove that to make a design
23 claim. They got to prove to you that there was a
24 way to make the cigarettes differently, a different
25 design, an alternative design that was feasible,

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1 that was knowable, that was known.

2 Have you heard any evidence in this case
3 about a different designed cigarette that was
4 available, feasible, known before 1969? Or even
5 until today? There isn't any evidence. That claim
6 fails.

7 Mr. Wilner had his opportunity to put
8 forward the proof There is no proof. That's gone.
9 But even if it wasn't gone, the second element in
10 this design defect claim, even if Mr. Wilner had put
11 on the proof that he didn't, you still got to show
12 that Grady Carter would have used it. He would have
13 used the alternative design and not smoked the Lucky
14 Strikes.

15 Now, Mr Carter did have a lot of
16 different cigarettes available to him. There were
17 filtered cigarettes, there were nonfiltered
18 cigarettes, there were low-tar cigarettes, there
19 were medium-tar cigarettes Lucky Strike came out
20 with a filtered cigarette There were filtered
21 Luckys during the time he smoked Lucky Strikes
22 nonfilter. He tried filtered cigarettes once in a
23 while; he didn't like them. So he didn't smoke
24 them.

25 Has there been any proof that he would

1 have used an alternative product that would have
2 avoided his injuries? None That's bogus. That
3 argument doesn't exist. Mr Wilner's claims in that
4 regard have no proof

5 And this charge, this instruction that His
6 Honor will give you, will demonstrate that he fails
7 on both counts All right, so let's get rid of this
8 design defect and talk about what the case is really
9 about

10 And that is failure to warn And that's
11 what we've been talking about the whole trial And
12 the jury verdict form that you saw and Mr Wilner
13 went over with you, there are two questions The
14 first one is, was defendant negligent, and the
15 second one was, was the product unreasonably
16 dangerous. Both of those are with respect to
17 warnings

18 The product is defective and dangerous, as
19 His Honor will tell you, when placed in the hands of
20 consumer without a warning. Okay There was no
21 warning on American's products before 1966, but this
22 does not mean that to prevent a product from being
23 deemed unreasonably dangerous a warning must always
24 be given. And that's key. That's why we're here

25 There is a duty to warn. And I want to

1 emphasize that because that duty question is what we
2 have to address first There is a duty to warn only
3 when the hazards associated with the use of the
4 product are not obvious, not reasonably apparent or
5 not as well known to the user as to the
6 manufacturer

7 So the duty question. That's what we got
8 to address. So we're going to talk about the duty
9 question That's why we showed you-all that
10 information about what people knew back in the '50s,
11 what the science knew, what the medicine knew.
12 That's why that information was relevent It's not
13 just a history lesson It's not just Dr Feingold
14 wanted to get up here and show you how smart he was
15 by looking at all these articles. He wanted to show
16 you that everything was known That the
17 manufacturer knew about his -- the dangers of this
18 product and knew far more than the public did;
19 because if he couldn't do that, plaintiff fails. He
20 didn't do that. And we'll go over that information.

21 Now, you also have to remember that for
22 both of the first two questions in the verdict form
23 -- when you look at that verdict form, you'll see
24 that they both say negligence or defect. That the
25 injury has to be caused by the failure to warn.

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1 In other words, in Florida under the law,
2 as His Honor will instruct you, the claim failure to
3 warn must be the "but for" cause of the injury. Now
4 what does that mean? That means that it wouldn't
5 have happened, the injury would have been prevented
6 if the warning had been given That's the flip side
7 of "but for " But for this, that doesn't occur.
8 That's what his claim is

9 And this is -- Your Honor will instruct
10 you on this as well, I believe. The defect in a
11 product -- and that's what they're claiming Lucky
12 Strikes were, defective, because they didn't have a
13 warning -- is a legal cause of injury -- and you'll
14 see those words "legal cause" in the verdict form --
15 if it directly and in natural and continuous
16 sequence produced or contributes substantially to
17 producing such injury so that it can be reasonably
18 said that but for -- see those words -- but for the
19 defect -- but for the failure to warn -- the injury
20 would not have occurred.

21 So that's what he's got to show you.
22 That's what he's got to show you to succeed on
23 either one or two. The proof is that he has not
24 shown that. There is no proof that a warning before
25 1969 would have changed Mr. Carter's behavior such

1 that he would have quit smoking. That's the issue.
2 That's the claim. That's what we're going to spend
3 a lot of time talking about But before we get to
4 that, I've got to talk about a few other things.

5 And first of all, let's go back to the
6 duty issue because before we get to "but for," we
7 got to find out whether there's a warning that has
8 to be given at all Let's talk about the duty issue
9 a bit and see where we're at in this whole issue of
10 what the manufacturer knew, because under the law,
11 as His Honor will instruct you, in evaluating
12 whether a manufacturer has a duty to warn --
13 remember that duty question we saw before in
14 negligence and defect and liability

15 In evaluating whether a manufacturer has a
16 duty to warn at any relevant time -- the relevant
17 time here is before 1969 obviously -- you must
18 consider the knowledge of the medical and scientific
19 community at that time

20 So as I told you, we're going through this
21 exercise to tell you what did the medical and
22 scientific community know. And the flip side of
23 that is that there is only a duty to warn only when
24 the hazards associated with the use of the product
25 are not obvious. That's what Mr. Wilner read you.

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1 And we're not saying it's obvious. It wasn't
2 obvious certainly in the 1940s, 1950s. It wasn't
3 obvious that smoking could cause lung cancer. That
4 certainly wasn't obvious to all the researchers who
5 were debating about the issue But obvious, not
6 reasonably apparent or not as well known to the user
7 as to the manufacturer That's the flip side

8 What did the user know? What was the user
9 being told about the product, its relationship to
10 lung cancer during the '40s, '50s and '60s? If the
11 manufacturer has no more knowledge than what the
12 common ordinary public knows about the problem
13 associated with the product, there is no duty to
14 warn

15 You don't see package inserts on eggs
16 warning people that they can cause high cholesterol
17 when you go to the supermarket. They don't put
18 warning labels on Harley Davidsons telling you don't
19 drive this fast or you can get in serious trouble.
20 Why? Because you don't have to tell people things
21 they already know. That's the law.

22 The manufacturer has to tell people when
23 it has superior knowledge When it knows things
24 that the common person doesn't know. What do we
25 have in this case? And we've gone through this

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1 evidence We went through it with Dr. Feingold.
2 We've gone through what the scientific and medical
3 community knew

4 First of all, in the '40s they didn't know
5 much of anything Dr Ochsner thought that he had
6 an association between smoking and lung cancer.
7 Dr Feingold certainly said he did. But by 1947 and
8 '48, he published seven papers where he repudiated
9 it Said the cause is unknown

10 In the '40s there was no controversy
11 There wasn't even a debate In the '50s there
12 started to become a debate Now, Mr Wilner would
13 have you believe that the debate was over That's
14 what Dr. Feingold said, so that's what Mr Wilner is
15 going to argue.

16 Dr. Feingold said by 1950 proof was
17 irrefutable. By 1953 everybody believed. By 1954
18 you had to be crazy -- remember that? He said you
19 were insane if you didn't believe it. He told us in
20 '55 anybody who disagreed was full of pap and
21 nonsense. By '58 you had to have holes in your
22 head. That's what Dr. Feingold said.

23 But that wasn't the case The case was
24 there was a debate. There was a wide-ranging debate
25 among scientists, among authorities. Not among paid

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1 scientific at tobacco companies You heard nobody
2 testify about paid scientists at tobacco companies
3 in the 1960s In the '1960s that wasn't in here.
4 Mr. Wilner is trying to tell you that the head of
5 the National Cancer Institute, the head of the
6 American Cancer Society, the head of the AMA, people
7 who are writing articles in the British Medical
8 Journal, The Journal of American Medical
9 Association. He's trying to tell you the editors
10 who are looking at all the information and conveying
11 to their readers where the research is going, he's
12 trying to tell you those are tobacco-paid
13 consultants The Surgeon General of the United
14 States is a tobacco-paid consultant? I don't think
15 so

16 Of course we saw the evidence And we'll
17 go through that just briefly I'm not going to go
18 through all of it, it would take forever I don't
19 have that much time. But it is important because
20 you got to know what that duty is so it can help you
21 with the flip side. And what is the flip side? The
22 flip side is what did the public know? We showed
23 you some of that We went through it with
24 Dr Feingold.

25 Dr. Feingold -- you remember this? I

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1 thought this was a good part of the
2 cross-examination, which was quite difficult and
3 lengthy. I'm sure it was difficult for you, too.
4 But it was a good part of it where he started going
5 through the public awareness. And I showed him an
6 article from Newsweek, and said, See, they're
7 talking about the studies, the studies of Wynder and
8 Graham, the study of Levin, the study of Doll and
9 Hill It's right here in Newsweek See their
10 conclusion They're saying it's an association He
11 says, Yes, that's exactly what I'm saying. They're
12 exactly right

13 And I showed him the study from Life, see
14 what they're talking about, the Wynder and Graham
15 experiments. Yes, see that proves I'm right I'm
16 right. Proves I'm right. It proves there wasn't a
17 controversy What it proved was the public was
18 hearing the evidence, the scientific evidence on one
19 side of the controversy.

20 To have a controversy you got two sides.
21 One side is what the scientists were saying, these
22 associations, statistical studies were showing. The
23 other side was what scientists were saying, wait a
24 minute, we don't believed in epidemiology. You
25 haven't controlled for all known confounders. You

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1 haven't controlled for unknown confounders. We need
2 some toxicology evidence. We need some laboratory
3 experiments

4 Other than just painting mice with huge
5 doses of condensate and seeing if you get any skin
6 tumors Let's look at what happens in the lung when
7 you do that Let's experiment. That was the
8 debate Now, was that newsworthy? Hardly. What
9 was newsworthy was somebody getting up and saying
10 I've got the answer Smoking causes lung cancer
11 That was newsworthy That was what was being
12 published That's what the public was hearing And
13 we showed you that And we'll talk about that too
14 just briefly because it is very important.

15 Under the law, if the public is hearing
16 what the scientific and medical community knew,
17 there is no duty to warn. None And so we'll
18 address that

19 Now, there's a couple other issues in the
20 case that I do need to talk to you about and I will.
21 One of them is the statute of limitations issue
22 which I think Mr Wilner dismissed as requiring
23 Mr. Carter to stop in the middle of his diagnosis
24 and file his lawsuit. Well, there's no --
25 Mr Carter had four years to file his lawsuit.

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1 That's what the law gives all of us If we don't
2 file within that four-year time, we don't have a
3 claim

4 Mr Carter thought about filing, according
5 to his testimony, about a year or so before he did,
6 but he didn't do anything about it until he saw the
7 ad when Mr. Wilner ran it for plaintiffs Then he
8 went in, but it was too late That's the law.
9 That's not this court's law That's the federal
10 legislature's law. You got four years. You don't
11 have to do it while you're sick. You don't have to
12 do it in the middle of your diagnosis. You don't
13 have to do it until you're good and ready, but you
14 got to do it within those four years.

15 And the time starts running, not when the
16 final pathology comes in, not when there's no
17 question, not when it's a hundred percent. The time
18 starts running when you know that you were injured
19 or you have good reason to find out. And we'll talk
20 about that.

21 But let's get back to the duty question.
22 What did the manufacturer know? Well, Mr. Wilner
23 said there was no controversy, was no scientific
24 debate; it was all fluff. It was all paid -- paid,
25 what did he call it? Paid doubters. Paid doubters

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1 by the tobacco company. Paid doubters.

2 Well, the Surgeon General report in 1964
3 didn't think so because it said -- and you have
4 this This is going to be in evidence. And I
5 encourage you to look through this report. It's a
6 landmark document There's some interesting things
7 in here, especially the chapter on addiction, since
8 we're talking a lot about it. Read the chapter.
9 It's called, The Characterization of the Tobacco
10 Habit, chapter 13. But I encourage you to look at
11 it It's not very long, and it goes through it
12 pretty well It's something I think we all should
13 do

14 But let me get back to the issue of
15 whether there was a trumped-up controversy or a real
16 one What the Surgeon General, Luther Terry, in
17 1964 said, few medical questions have served such
18 public interest or created more scientific debate
19 than the tobacco/health controversy. Controversy.
20 He didn't say no controversy. He didn't say this
21 was done in '53, 11 years before. He said there was
22 a scientific debate. The interrelationships of
23 smoking and health are undoubtedly complex And
24 they are still complex. We've seen some of that
25 complexity during this trial.

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1 But the subject does not lend itself to
2 easy answers Nevertheless, it has become
3 increasingly apparent that answers must be found. I
4 mean that's what the basis of this report was This
5 report was to look at the controversy that was
6 brewing over these 14 years prior to it. Assess
7 it Look at the evidence. Come to a conclusion.
8 And they did And we showed you some of the
9 evidence that they were looking at.

10 First of all, we start back in the '40s.
11 Dr Feingold said Dr Ochsner, '41, that's it That
12 proves it, let's go on. We played this little game
13 with Mr Wilner I'll be the medical adviser to the
14 American Tobacco Company, and I'll tell you what I
15 would have told the American Tobacco Company at that
16 time

17 Well, fortunately we have a record of what
18 the medical doctors, the real authorities, the real
19 scientists were saying at the time. We don't have
20 to rely upon what Dr. Feingold speculates they might
21 say some 10 or 15 years before he was born. We can
22 go back and see what they said.

23 And when we go back and look at Ochsner,
24 who was an important guy at that time, in 1947 and
25 '48, about the time Mr. Carter started smoking, what

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1 did Ochsner say? Published seven papers. Seven
2 papers in 1947 and '48 Did Dr Feingold show you
3 one of these when he was testifying on direct? No.
4 I suggest the reason he didn't was because all seven
5 of these have conclusions in them that were
6 diametrically opposed to what he was trying to tell
7 you The cause of bronchogenic, which of course is
8 lung cancer, now we know, is still unknown.
9 Although a number of factors have been considered as
10 contributing to the development of the disease
11 including particularly smoking and inhalation, no
12 factor having significance from this standpoint has
13 been found in the analysis of our cases.

14 He goes on. The apparent increase in the
15 incidence of carcinoma of the lung has given me much
16 speculation concerning its cause. Both occupation
17 and smoking which have been emphasized by some
18 observers as possible etiologic causal factors and
19 which we were inclined previously to consider more
20 seriously were found to have no special significance
21 in the analysis. Previously, '41, he considered
22 that. Now he's saying no special significance.

23 It goes on, cause of bronchogenic
24 carcinoma is not known Goes on. Although there's
25 been much speculation concerning cancer or

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1 bronchogenic carcinoma, no satisfactory explanations
2 have been offered.

3 Dr Ochsner had doubts This wasn't
4 proven And if Dr Ochsner had doubts, I mean this
5 was the man If anyone would find a correlation
6 between smoking and cancer, it was Dr Ochsner But
7 by 1947 and '48, he was having serious doubts. He
8 said the cause of bronchogenic carcinoma is unknown.

9 That's something that Dr. Feingold didn't
10 tell you. But let's go on I want to skip ahead to
11 '53. There was a -- much to-do to me about the
12 statement by Paul Hahn called "Loose Talk." You
13 heard that a lot during the trial And if you
14 recall, Dr Feingold said to make that statement in
15 1953, that there were a lot of loose talk about
16 cancer causation, was criminal That's what he
17 said. Remember that? He said it was criminal.

18 Well, in 1953, almost the same things were
19 being said by Dr. Smithers, British Medical Journal.
20 That's in Britain. But this was one of the big four
21 that Dr Feingold told us you got to look to when
22 you're trying to figure out what's going on in the
23 medical community.

24 British Medical Journal in 1953, same
25 year, talks about the fact that it's important that

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1 they do not make matters worse by merely joining in
2 a cry and alarm. It's a difficult problem, lung
3 cancer And you got to help deal with it
4 efficiently We should beware of putting
5 extravagant accounts of rising cancer death rates
6 and their causes before the public especially when
7 neither the magnitude of the one, the rising death
8 rates, nor the degree or responsibility of the
9 other, the causes of this cancer, has yet been fully
10 established. Flowery language, much more flowery
11 than Paul Hahn, but the same point We don't know
12 yet We can't be using extravagant words to
13 describe a rising epidemic when there's a real
14 question whether the epidemic is actually rising or
15 not.

16 Remember during the '50s we looked at the
17 literature. People were saying, is it really
18 rising? Is this cancer rate really rising because
19 of some unknown cause or is it merely the fact that
20 we're getting better diagnosis and people are living
21 long? We invented the flexible bronchoscope. We've
22 got a better way to diagnose the disease, so we see
23 more of it. It was an issue then. That was what
24 the scientists were saying and the doctors were
25 saying.

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1 1953 -- let me just show you one more from
2 1953 because this was -- I love this one. I asked
3 Dr Feingold, would it be criminal to say in 1953
4 that there was no conclusive evidence that smoking
5 caused lung cancer? Would that be criminal? He
6 jumped right on it. Absolutely Absolutely.
7 Criminal, criminal. Because either Dr. Feingold
8 didn't look at what people were saying at the time
9 or, to be charitable, Dr Feingold was looking back
10 at the evidence with today's perspective

11 Now, we're not going to go through all of
12 this, but this is one I thought was very interesting
13 because it was by the president elect of the
14 American Medical Association in December 1953, and
15 what did he say? There has not been -- been no
16 conclusive evidence that smoking causes cancer of
17 the lung. Cancer of the lung possibly is just as
18 related to other foods, foods and auto engines, as
19 to cigarette smoke. 1953, December.

20 Now, the question is not whether
21 Dr. Martin was right or Dr Martin was wrong.
22 That's not the question on this issue of duty to
23 warn. That's not the question that you have to
24 resolve on this issue of whether or not a warning
25 was required.

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1 What you got to resolve is whether or not
2 this was part of the representative group of
3 physicians who were contesting whether cause had
4 been shown And I submit to you that the president
5 of the AMA is a physician of such noteworthy
6 stature He's someone that other doctors would look
7 to for advice. He is someone who speaks on behalf
8 of the largest medical association of doctors in the
9 country at that time

10 So when Dr Martin was saying this, was he
11 saying there's no cause that lung cancer is
12 resolved, there's no conclusive evidence? Is that
13 the state of the science at the time? Definitely
14 not In 1953 this was when, as Dr Feingold told
15 you, Hill and Doll came up with their study the year
16 before and said they thought that smoking was a
17 factor in developing cancer. He didn't exactly say
18 cause, but they said they thought it was a real
19 factor. And there were other people, Wynder and
20 Graham and there were others that you heard about,
21 who also had similar claims. There's a
22 relationship. It's a fact. We got to study it.

23 But the point is that that was the debate.
24 And it fluctuated. When one study comes out, we're
25 going to get more people on board. It goes back

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1 down the next year But that was the debate. It
2 wasn't trumped up It wasn't paid tobacco
3 scientists. It was a real debate.

4 Now, if you'll bear with me, I'm just
5 going to run through this quickly about the Frank
6 Statement, because there's been a lot of talk about
7 what the tobacco company was saying to the public at
8 the time. And I want to run through this with you
9 to show you how the tobacco company was really
10 addressing this problem

11 In the Frank Statement in December --
12 excuse me, January 4, 1954, just a short time after
13 Dr Martin made his statement First of all, as you
14 remember Wynder and Graham had come up with that
15 mouse painting study. They shaved these little mice
16 and coated them with condensate and they got skin
17 cancer.

18 They said recent reports on experiments
19 with mice have given wide publicity to a theory that
20 smoking is in some way linked with lung cancer in
21 human beings. They had to give a lot of publicity.
22 Remember we showed you some articles where they were
23 talking about the skin painting experiments. That
24 was big news. It was spread around the country.
25 Although conducted by doctors of professional

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1 standing -- and I think that's important -- the
2 tobacco industry, American, who was one of the
3 first, Paul Hahn, was not discounting this. They
4 weren't saying don't believe it, it's a bunch of
5 bunk It doesn't -- it's baloney done by
6 crackpots No, they said they were conducted by
7 doctors of professional standing. And they also
8 went on to say these experiments are not regarded as
9 conclusive in the field of cancer research. And
10 they weren't

11 If you recall, 1953 -- and this is in
12 evidence Let me see if I can find it. It's in
13 Defendant's Exhibit No. 11. In 1953, the president
14 -- excuse me, the director of the National Cancer
15 Institute, somebody who should know, said exactly
16 the same thing that's said here. The experiments by
17 Wynder and Graham were not conclusive in cancer
18 research. Much more research is necessary and the
19 cause of lung cancer is not known John Heller,
20 director of National Cancer Institute in '53.

21 So this isn't -- this isn't pap from the
22 tobacco industry. Although when Dr. Cameron,
23 remember Dr Cameron, president of the American
24 Cancer Society, who was president at this time. And
25 in response to an article by Wynder and Graham,

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1 Dr Cameron sent a letter -- and this is also in
2 Exhibit 11 Dr Cameron sent a letter where he
3 said, these are interesting experiments but they're
4 not conclusive. This is not proof. We need the
5 ultimate experiment We need lung cancers through
6 inhalation of smoke because condensate differs a
7 great deal from the human smoking experience.

8 Dr Cameron said that in '54. Was he
9 right? Was he wrong? It doesn't matter for the
10 purposes of determining duty. It just matters that
11 there was another eminent authority who was agreeing
12 basically with what the Frank Statement was saying
13 We don't know Dr Feingold said Cameron was full
14 of pap President of America Cancer Society.

15 Now, it could very well be what
16 Dr. Feingold was saying that looking back from
17 today's perspective I don't think I would have
18 required that level of proof. Maybe he wouldn't.
19 He wasn't there. At the time he was three years
20 old.

21 What Dr. Cameron was saying was reflective
22 of the time. And any other issues on here, medical
23 research of recent years indicates many possible
24 causes of lung cancer. We've seen that. That's one
25 of the reasons they're doing all this research. No

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1 agreement among authorities what the cause is. And
2 there wasn't at this time. Public Health Service
3 two years later was still saying we don't know what
4 the cause of lung cancer is That's in evidence.
5 That's a part of No 11.

6 There's no proof that cigarette smoking is
7 one of the causes. And people debated about that.
8 Some people said there was; some people said there
9 wasn't Statistics purporting to link cigarette
10 smoking with the disease could apply with equal
11 force to many other aspects of modern life Those
12 statistics -- Dr. Feingold told you those statistics
13 were conclusive by this time

14 But he did admit when he was asked on
15 cross-examination that Dr. Hammond, one of the
16 leading statisticians of the time, did say -- and
17 this is two months later -- that the death rate from
18 cancer is no higher among smokers than among
19 nonsmokers in the human population. You can forget
20 the whole business. He had doubts about that two
21 months after the Frank Statement.

22 But if there is a difference, then you
23 should look to other evidence, such as animal
24 experiments, to determine whether you're dealing
25 with a cause-and-effect relationship or whether you

1 are dealing with an associated cause. That was the
2 debate Even if there was an association, we still
3 have to look further. Now, were they right? Were
4 they wrong? It was what they said This is
5 American Cancer Society's leading statistician.

6 One more I got to show you one more.

7 Dr Greer Dr Greer was the president of the
8 America College of Chest Physicians in 1954. We
9 went through this with Dr Feingold. Remember he
10 called -- he called Greer befuddled. He said Greer
11 was befuddled because in discussing the evidence
12 about smoking and lung cancer he said that the
13 evidence was unclear The evidence was befuddled.
14 And the true answer was for the future to decide.
15 Dr Feingold says, Oh, yes, yes Dr Greer.
16 Befuddled, I remember him Befuddled.

17 But actually what did Dr Greer say? Many
18 physicians are of the opinion that cigarette smoking
19 is a causative factor, one-half of the controversy.
20 Many others, perhaps the majority, hold the opposite
21 opinion. The other half of the controversy. That's
22 what makes a controversy There's two sides.
23 Dr. Feingold showed us one side, but there was
24 another side It was a controversy, and it was
25 real. And the controversy continued.

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1 Now, the tobacco company, did they ignore
2 the controversy? Did they ignore this? No. What
3 did they do? Well, they pledged to aid and assist
4 research effort into all phases of tobacco use
5 Joint financial aid will of course be in addition to
6 what is already being contributed by other
7 companies

8 So at this time as you have heard in
9 testimony, American Tobacco Company, among others,
10 were giving money to researchers, Medical College of
11 Virginia, other places in the country were being
12 funded for scientific research American Tobacco
13 Company, they're not statisticians They're not
14 doctors. They're not going to be performing this
15 research. And if they did, what do you think
16 Mr. Wilner would say about their research? What
17 they did was they funded independent researchers.
18 They gave them money and say, go ahead, study
19 cancer Here's a grant. And they did that with not
20 only their own, but they did it in a joint group
21 called the Tobacco Industry Research Committee. And
22 they funded money. And they're funding money until
23 today.

24 This is one of the books that reviews all
25 the grants that they funded up through the year

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1 1990 It's Defendant's Exhibit 15. And look
2 through it. According to Dr Feingold, this was --
3 this research was all pap It was not good. It
4 wasn't addressing the issue They never looked at
5 lung cancer Well, one of the articles in here is
6 called "Growth Factors and their Receptors," which
7 of course is where molecular biology is looking at
8 today It was published in Oncogenes in the
9 Molecular Voyages of Cancer. It was supported by
10 the National Institutes of Health, the America
11 Cancer Society It was done at the Division of
12 Metabolism, Center for Molecular Genetics, School of
13 Medicine, University of California Thumb through
14 it, it's all filled with this stuff. I wouldn't
15 want to read more than maybe the titles because it
16 is pretty dense It's molecular biology That's
17 where cancer research is. It's being funded by the
18 Council for the Tobacco Research, a successor to
19 this group. So they were doing research They were
20 funding research by independent people who can do
21 the research. People like Dr. O'Hanley, molecular
22 biologists.

23 In 1990, the Council -- wait It says,
24 the council continued to provide substantial funding
25 for research in 1990, receiving 16 million dollars,

1 an increase of two million dollars from 1989 from
2 its members, the tobacco companies. The sum is
3 brought to more than 165 million dollars The
4 council's support of research it was funding,
5 research on the issues of carcinogenesis, issues
6 that are important today That was what the tobacco
7 company's response was

8 Now, The American Tobacco Company also did
9 other research They did provide information for
10 other scientists in terms of analytical chemistry,
11 which was their specialty. They did do a great deal
12 of analytical work And it was provided to everyone
13 through publication in scientific journals They
14 funded the Medical College of Virginia It's in
15 evidence, I think it's Plaintiffs' Exhibit 2. It's
16 a summary of all different abstracts from the early
17 days of that research effort of the Medical College
18 of Virginia. And they also developed such things as
19 mass spectrometry, gas chromatograph and these other
20 things to use for tobacco development.

21 So what was -- okay, here we are. We're
22 going on, and the debate continued. Let's jump up
23 to 19- -- we skipped ahead a little bit, jump up to
24 1959. Because that takes us almost up to '62
25 Surgeon General's committee. In '62 they formed the

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1 committee, in '64 they wrote the report

2 In 1959 this is an editorial, an editorial
3 in JAMA Dr Feingold told you editorials were
4 important. They were important because they
5 reflected kind of a view where people are They
6 tried to show what was happening in the community.

7 And what did this editorial say? A number
8 of authorities who examined the same evidence
9 decided by Dr. Burney did not agree with his
10 conclusions, et cetera And what were those
11 conclusions? Dr Burney had said just earlier to
12 this that smoking was a cause -- excessive smoking
13 was related to lung cancer, was a cause of lung
14 cancer. Part of this debate

15 The response was a number of authorities
16 looking at the same evidence come to a different
17 conclusion. That's the debate. That's what was
18 going on.

19 At the same time all this was going on,
20 what was happening in the public media? Well,
21 that's Exhibit 7, 8 and 9, Defendant's I'm not
22 going to go through them all, but let me show you a
23 couple. These are going to be in evidence, too. I
24 think they're interesting. This is the one, if you
25 recall it, Mr. Wilner showed you when he was

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1 examining Dr. Feingold Remember this experiment,
2 these pictures? These pictures were taken of Evarts
3 Graham during the conduct of the Wynder/Graham mouse
4 painting studies But where were they published?
5 They were published in Life magazine. Life magazine
6 in 1953. People were hearing this. This was big
7 news

8 Also a picture of the Medical College of
9 Virginia that was looking at tobacco, labeled
10 "Cigarette Smoke " Another study being funded by
11 American Tobacco Company Now, there's -- we got
12 lots of these, but let me just show you a couple
13 that I think were interesting because -- well, this
14 one I did show you earlier again in cross-examining
15 Feingold. Remember this?

16 I thought this was good for a couple
17 reasons. First of all, it's 1954. It shows that
18 people are quitting and a topic of the week was,
19 "How do I swear off?" Then it's got all of these
20 humorous caricatures of people quitting, right, cut
21 off your hand. Hang yourself. Why are those things
22 funny? They're funny because people knew it's
23 difficult to quit smoking. People knew that. You
24 didn't have to tell them that. That's what we're
25 talking about by public knowledge. That was one of

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1 the things that people understood at that time.

2 It's difficult to quit smoking

3 Twentieth century term, coffin nail comes
4 back Coffin was another term that's been around
5 for a long time to talk about smoking Humorous?
6 Well, it's a term that people have used to describe
7 smoking in a humorous way, but it also recognizes
8 that there are health risks to smoking

9 Another article This is little later,
10 1956, and I don't know if you know who this guy is,
11 but that's Dr. Oscar Auerbach Very important
12 figure in this case We've heard a lot about him
13 not only historically but present day This is
14 where he was doing his experiments with pathology to
15 find whether certain cancer types are associated
16 with smoking You can see all the microscopic
17 slides. And here you go. Here's the -- here's the
18 pictures of those ciliated cells. Remember those
19 waving cilia, the bronchial lining. And then he
20 shows pictures of cancer development from those
21 ciliated cells.

22 The point is it was all out. It was
23 getting to the public. The public was hearing it

24 Now, let me just see if I can sum up
25 quickly, and we'll do this fast. Dr. Feingold, he

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1 had his advice for the company He told them what
2 the company should be doing and what they shouldn't
3 be doing And he told them -- he told us that the
4 company should have warned here, they should have
5 been warned there But what were the people in
6 authority at the time saying? What were the people
7 who were living at that time saying? Not people
8 sitting here today in court 1996 speculating. What
9 were the people saying?

10 Well, Dr Churchill, speaking on behalf of
11 the American Cancer Society, the American Medical
12 Association in 1948, the year Mr Carter started
13 smoking, said further knowledge about the nature and
14 mode of action of carcinogenic agents in a careful
15 recording of smoking habits of ample numbers of
16 patients with the disease provide no factual
17 evidence on which advice to give up smoking for this
18 reason can be based. Nothing is known about the
19 cause of the disease. This was an article about
20 cancer Lung cancer 1948, nothing known.

21 1955, jumping ahead. We talked about
22 '53. Let's go to '55. Surgeon General, Surgeon
23 General in 1955, the man who was speaking on behalf
24 of the U.S. Public Health Service, said, has no
25 proof to indicate that smoking causes lung cancer or

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1 heart trouble, although cancer of the lung appears
2 to be a greater risk in heavy cigarette smokers
3 This is not to say that smoking causes cancer, lung
4 cancer Other factors may be involved This is
5 1955, the Surgeon General responding to a request
6 for information, responding to the guidance
7 committee of the CIO about what was known by the
8 Public Health Service in 1955 That was his
9 response.

10 Was the Surgeon General stupid? I don't
11 think so Dr Feingold told us that anybody in 1955
12 who still had doubts was stupid Dr Feingold was
13 looking at it from today's perspective He didn't
14 look at it from that day's perspective.

15 Sure, there are many people who were
16 saying the exact opposite. Many people were saying,
17 it's proven We don't need this further evidence.
18 Doll and Hill, two British guys, they were saying
19 that But there were other people debating it, and
20 that's the point. That's why we showed you that
21 videotape, John Heller We showed you the videotape
22 of him in 1955 where he said half of the scientists
23 at the NCI disagree with the other half over that
24 issue. I thought that was perfect. It shows the
25 debate firsthand.

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1 These aren't being paid by tobacco
2 companies This is the National Cancer Institute.
3 Let me just move on.

4 In 1957, this again goes to this whole
5 issue of warning, what would people know and should
6 know Dr Heller, the National Cancer Institute,
7 and Dr Burney, who was the Surgeon General of the
8 Public Health Service, declined today to recommend
9 printing of warning labels on cigarettes We don't
10 have sufficient evidence at this time of actual
11 causative cancer agents in tobacco to take such a
12 step, Dr Burney testified Testified before
13 Congress That's in the evidence as well,
14 Defendant's Exhibit No 5 When Dr Feingold was
15 asked about this, he said, well, Dr. Burney was
16 confused.

17 Moving on to 1964, Dr Blasingame on
18 behalf of the American Medical Association,
19 executive vice president, sent a letter to the FTC
20 with respect to labeling on cigarettes. And this is
21 -- I think this is very important because I think
22 this really gets to the heart of this whole issue of
23 what did the public know? What did the scientific
24 community know? With respect to cigarette
25 cautionary labeling, those are the warning labels,

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1 cannot be anticipated to serve the public interest
2 with any particular degree of success. The health
3 hazards of excessive smoking have been well
4 publicized for more than ten years and are common
5 knowledge. From the executive vice president of the
6 AMA, a person there at the time.

7 Now, what did Dr Feingold say about
8 this? He said, oh, he was bought off. He was
9 bought and paid off. He was bought off by the
10 tobacco companies. A man he's never met, knows
11 nothing about, other than the fact that he wrote
12 this piece.

13 It was published in the Journal of the
14 American Medical Association. This was a black
15 eye. This was a terrible thing for the American
16 Medical Association. Why? Because 15 million
17 dollars of grant money was distributed through the
18 American Medical Association to researchers. That
19 was what he was talking about, about being bought
20 and paid for.

21 The tobacco industry and others got
22 together to distribute money to researchers on
23 cancer and heart disease. Money that was spent in
24 over a hundred laboratories resulting in 795
25 publications and this book, Tobacco and Health,

1 Search for Study -- Research Study for the
2 Relationship of Tobacco and Health It's Exhibit
3 No 6. Look at it It's very extensive. Goes
4 through many of the studies, abstracting them out.
5 It's a very well-done effort The people who were
6 on the board were the same people who made up the
7 Surgeon General's committee itself, John Hickman, he
8 was on the Surgeon General's committee. Lamayor,
9 Charles Lamayor, Surgeon General's advisory

10 committee 1964 They were continuing the research

11 This is what Dr Feingold said was being
12 bought and paid for This by a man who earned two
13 and a half million dollars testifying for asbestos
14 companies A man who never wrote a single medical
15 article for a single medical journal, whose basic
16 claim to fame is he coauthored a book with
17 Mr. Wilner on how to defend asbestos companies in
18 trials. He is saying that Dr. Blasingame and the
19 AMA and this research effort is all bogus. All
20 bought and paid for.

21 Well, even Dr Feingold couldn't defame
22 Daniel Horn. Daniel Horn was the director of the
23 National Clearing House for Smoking and Health,
24 1968. 1968, just a few years before Mr. Carter quit
25 smoking Lucky Strike cigarettes. And what he was

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1 quoted as saying, efforts to ban cigarette smoking
2 cannot simply rely on spreading the word about the
3 evils of smoking, Dr Horn contends. You could
4 stand on a rooftop and shout smoking is dangerous at
5 the top of your lungs and you would not be telling
6 anyone anything they did not already know. That's
7 1968

8 So the duty issue, when you look at the
9 duty issue, you have to look at all the evidence
10 You have to look at the evidence of what the
11 manufacturer knew and judge that by what the medical
12 and scientific community knew And you got to look
13 at what the public knew and compare the two. That's
14 the issue on duty. And I believe that when you look
15 at that issue you will find that there was no duty
16 for the American Tobacco Company to warn before
17 1969, the issue in the case.

18 Now, I got to address some issues about
19 another factor in coming to a verdict in the case,
20 and that's causation. Mr Wilner talked about this
21 a bit. I need to address some of the issues he
22 raised. First of all, let's review what the
23 evidence was. We heard from Dr Feingold who said
24 smoking, lung cancer, that's it. Look at these
25 statistics. You got a big, big, big line over here,

1 little nub over here, that's it We got it. Bingo,
2 we're gone. Why? Because he asked you three
3 questions, and you couldn't answer them so therefore
4 we know its cause So just line them up, bring them
5 in, stamp them Did you smoke? Got lung cancer,
6 you're gone It's definitely related But it's not
7 that easy

8 It's true that ten percent of lung cancers
9 occur in nonsmokers. If Dr. Feingold had his way,
10 that wouldn't be a fact Because what he was saying
11 is every single person that comes in the door, sits
12 down in the chair, you got lung cancer You must
13 have been a smoker, get out of here.

14 He doesn't even need to diagnose other
15 than to find out that the guy had lung cancer
16 That's all he needs. He doesn't even need to ask
17 them if he was a smoker. According to Dr. Feingold,
18 smoking caused it whether you smoked or you didn't
19 smoke. It's not that easy And that's not the
20 proper way to apply statistics

21 Now, we brought an individual to this
22 trial who I believe is one of the most qualified
23 witnesses to testify

24 MR. WILNER: Objection to counsel giving
25 his personal beliefs in this trial.

1 MR SHEFFLER Your Honor, let me rephrase
2 my statement.

3 THE COURT All right

4 MR SHEFFLER There can be no question
5 that Dr Peter O'Hanley was the most qualified
6 expert to testify in this trial. He was an
7 epidemiologist. He was an epidemiologist who's
8 practiced epidemiology around the world. He's
9 practiced epidemiology in third world countries on
10 the bases of the WHO, conducted trials, conducted
11 diagnostic research, conducted vaccine trials,
12 helped in a clinic in Indonesia He does
13 epidemiology He uses it. It's one of his tools,
14 he's trained in it. He's the only epidemiologist to
15 testify here.

16 He's also a molecular biologist. He has
17 his own laboratory at Stanford University, a lot of
18 people working for him. He has identified in
19 sequence 15 different genes He's published 65
20 different articles in all peer-review journals,
21 scientific articles. He's authored 30 different
22 chapters in books on medical and scientific issues.

23 Dr. Feingold hasn't published a thing in a
24 medical journal. Dr. O'Hanley is also, in addition
25 to all those other jobs, a practicing doctor. He

1 heads the clinic in Palo Alto for homeless veterans,
2 and he teaches. He teaches young doctors how to
3 become doctors

4 So when Dr. O'Hanley came here to testify,
5 he brought with him a wealth of information. He
6 didn't stack up a lot of papers on his desk because
7 he didn't need to. He didn't need to because he
8 knew this practically. He did it. He knew what
9 epidemiology was. He didn't have to read about it.
10 He knew it. He used it.

11 And what did he tell you? He told you
12 that it was one basic underlying premise to the
13 science of epidemiology. It's a study of
14 populations, not individuals. You cannot apply a
15 statistical association, which is all epidemiology
16 does, to the individual. That is a premise. That
17 is a basic tenant of epidemiology that Dr. O'Hanley
18 held, held deeply, held strongly and was here to
19 testify about.

20 And he then went on to say, well, what
21 other tests do we have? What other tests do we
22 have? Well, in cancer, fortunately we don't have
23 other tests. We don't have the test to allow us to
24 differentiate between cancers in terms of cause.
25 Why? Because we don't know what the cause really

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1 is It's very true. Molecular biology is
2 researching it today It's very true; we don't know
3 what happens on a genetic level And Dr. O'Hanley
4 said that you cannot determine that cause without
5 that knowledge

6 Did we ask him to look at a couple of
7 genetic mutations? Yes, we did Why? Dr. O'Hanley
8 didn't want to look at those genetic mutations on
9 his own because he said it doesn't show us anything
10 But we asked him to do it because those two
11 mutations were the ones that Dr Feingold had
12 identified as being associated with tobacco-related
13 cancers According to Dr Feingold, and you have it
14 in evidence, Dr Feingold believes that there is a G
15 to T transversion and a p-53 overexpression in
16 adenocarcinomas related to smoking. Read it. It's
17 in his little book that he wrote with Mr Wilner,
18 and it's also in another document from his expert
19 disclosure for this case.

20 So we had the test done. We had the test
21 interpreted by Dr. O'Hanley. And what did they
22 find? They didn't find a G to T. They didn't find
23 either the p-53 mutation So is that the end of
24 story? We proved it's not caused by smoking. It's
25 not what Dr. O'Hanley said Dr. O'Hanley said, I

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1 don't know whether this cancer was caused by smoking
2 or not

3 Now, plaintiff thinks that's great
4 That's great for them Aha, he can't say it wasn't
5 caused by smoking or it was caused by smoking. We
6 win No, no The plaintiff has to prove that it
7 was caused by smoking. If science, if epidemiology
8 and science does not permit that conclusion in this
9 man's case, plaintiff can't win. It's not enough
10 for him to say lung cancer in general was caused by
11 smoking Most of it's caused by smoking, so it must
12 be caused by smoking in this guy It doesn't work
13 that way

14 He's got to show you the objective
15 scientific evidence that indicates Mr. Carter's
16 cancer was caused by smoking It can't be
17 statistics. It's got to be something objective,
18 some indication that say that, yes, this man's
19 cancer was caused by cigarette smoking.

20 Now the G to A doesn't do it. Mr. Wilner
21 strove mightily to get G to A mutation had occurred
22 in Mr. Carter's cancer to be related to cigarette
23 smoking. He even spent almost a day talking about a
24 single article that was written by Wynder and
25 Hoffman in 1995. Remember that article? He

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1 examined Dr. Pearl for half a day Had him go home
2 and study it over the weekend, because Dr Pearl
3 never saw it before. Dr Pearl is not a molecular
4 biologist, he's a pathologist But nevertheless,
5 Mr Wilner wanted to find out if he could make this
6 G to A some way He's desperate.

7 He never tried to do it with Dr Feingold;
8 he's going to try to do it. He's going to try to
9 make this working hypothesis, and that's what this
10 thing is called, a working hypothesis A guess A
11 theory. In rats NNK in rats at a level of 13
12 packs a day You'd have to smoke 13 packs a day to
13 get the level of what the lowest amount of the
14 experimental stuff is that they were injecting into
15 these rats.

16 And what did they find? They found a G to
17 A transition. And what does that mean? Absolutely
18 nothing. Rats don't have the same genetic makeup as
19 people That's what Dr O'Hanley explained.

20 Dr O'Hanley explained that when you do
21 experiments in molecular biology you've got to use
22 the cells of the species You don't use rats. They
23 don't have the same chromosomes. They don't have
24 the same genes. They don't have the same molecular
25 events.

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1 So what do you do? Do you inject people
2 with NNK? That's what Mr Wilner suggested. No, of
3 course not You take cells from people. You grow
4 them in a petri dish, and then you take and analyze
5 the DNA of those cells That's what's happening in
6 his lab today as we speak This is happening in
7 labs all over the country as we speak

8 And when they do it in human cells, what
9 do they find? They find, as Dr O'Hanley explained
10 to you, because he does this stuff He doesn't just
11 read about it. He actually does it. When they do
12 it with human cells, when they do it in a petri
13 dish, when they do it in vitro, as it's called, they
14 find the chemicals will cause transversion.

15 Chemicals will cause G to T transversions What
16 happens in these cells spontaneously, i.e , without
17 any chemicals, is transitions G to A transitions.

18 Now Dr O'Hanley didn't say, ah, I found a
19 transition. That means I've got a cancer caused by
20 spontaneous event He didn't say that. He did not
21 say that I wish he did. He didn't say that
22 because he doesn't know nor does science know what
23 genes are mutated to cause cancer. That was the
24 point of his testimony That's what Mr. Wilner
25 didn't get. That's the point of what Dr. O'Hanley

1 was saying We don't have the tests for it. We
2 can't distinguish it.

3 You can line up ten people here in the
4 jury box with lung cancers One of them can be a
5 nonsmoker, none of them can be a smoker. There's no
6 test to find out who was which. Why? Because we
7 haven't progressed that far with lung cancer You
8 can't apply statistics to individuals.

9 Now, there are some guidelines There's
10 some things, some markers that we can look for And
11 that was what Dr. Pearl was talking about
12 Dr Pearl came and told you that in cancer causation
13 Dr Auerbach had identified certain markers that
14 seemed to occur with cancers that were associated
15 with tobacco smoking That's what this whole cilia
16 business is all about. Dr. Pearl is a pathologist,
17 same as Dr. Auerbach. That is his specialty, just
18 like Dr Auerbach. He's not a molecular biologist.
19 He's not looking at genes. He's looking at slides
20 of cells, and he's looking at the changes those
21 cells go through. Did he find the changes that
22 Auerbach described with tobacco-related cancer in
23 this case? No. And he showed you that, he showed
24 you the slides themselves.

25 He had objective evidence from

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1 Mr Carter's tumor that he went over with you to
2 show that the changes that occur with tobacco-
3 related cancers weren't here But he also went on
4 and he said something more which I thought was very
5 important, and I think you will think it's very
6 important too because the evidence is that
7 Mr Carter's cancer did not arise in the bronchi.
8 The air tubes It arose in the peripheral
9 bronchioles and air sacs.

10 And why is that important? Why is that
11 necessary to know in terms of causation? Because
12 before you can even say that you have an association
13 between two things, you have to have at least
14 epidemiology proof. That's what all this 1950s and
15 '60s were doing. They had the epidemiology. Do we
16 have the proof? All right.

17 Now, Dr. Feingold thinks epidemiology is
18 sufficient to say to you, the jury, if you have an
19 association between adenocarcinoma and smoking,
20 that's enough to say that any smoker with
21 adenocarcinoma must have been caused by smoking.
22 And he showed you a picture Remember that graph --
23 we've seen that graph so many times. The graph of
24 adenocarcinoma of smokers versus nonsmokers. But
25 the important thing to remember about interpreting

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1 that -- and I'm sure you can recall. It's got those
2 little bar lines It's got smokers over here, and
3 Mr Wilner pointed out the little nub with
4 nonsmokers.

5 But the important thing to remember about
6 that, that was all adenocarcinoma. They took out
7 the major portion of the peripheral adenocarcinoma.
8 Dr. Feingold didn't tell you that. Dr. Pearl didn't
9 know that when the chart was thrown up on the screen
10 before he had a chance to read the article But
11 once he read the article, he said, hey, look, that's
12 not representative of peripheral adenocarcinoma.
13 And it's certainly not representative of the
14 peripheral adenocarcinoma as defined by Auerbach.

15 As defined by Dr. Feingold, it's defined
16 clinical, peripheral adenos, everything in the outer
17 third of the lung. He testified to that. Remember
18 that? That was his testimony And that's a
19 clinical definition. But if you look at it from a
20 pathology point of view, peripheral adenoma is a
21 very technical term. It is those cancers arising in
22 the bronchioles and the air sacs. We went through
23 that testimony That's where Mr. Carter's cancer
24 arose. He showed you that. He showed the actual
25 slides that he took, pictures he took of

1 Mr. Carter's cancer and showed you where it arose.

2 And why is that important? It's important
3 for one reason It's important because it hasn't
4 been associated with smoking. Now, this article we
5 did show to Dr. Feingold We asked Dr Feingold
6 about Oscar Auerbach We asked Dr Feingold about
7 the changing pattern of lung cancer. We asked
8 Dr Feingold to read the first sentence of this
9 article. The first sentence which says, carcinomas
10 arising in the peripheral parenchyma of the lung
11 with no bronchial involvement -- exactly like the
12 kind of cancer Mr Carter had -- may have a
13 different cause than bronchogenic carcinoma, cancers
14 arise in the bronchi. They have not been related
15 directly to exposure to tobacco-smoking habits or
16 any other known carcinogenic agents They're not
17 directly related Not associated And that was the
18 point of the entire article

19 Now, who wrote the article? Oscar
20 Auerbach, Lawrence Garfinkel. Lawrence Garfinkel
21 was -- you can see down here in the bottom, the
22 department of epidemiology and statistics, American
23 Cancer Society.

24 Now, Mr. Wynder doesn't like the
25 statistics in this article Well, this is not a

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1 case-controlled study. It was a population study
2 based on an autopsy series. And Dr. Auerbach and
3 Lawrence Garfinkel were satisfied with the
4 statistics of the study, so satisfied that they were
5 publishing this in the Journal of Cancer. And the
6 peer reviewers for that journal were also satisfied
7 with the statistics of the article And the
8 conclusion of the article remains

9 Now, that's 1991 That is the evidence we
10 have on peripheral adenocarcinoma We don't have
11 any studies on peripheral adenocarcinoma other than
12 this Dr Feingold was asked -- I asked
13 Dr Feingold on the stand, do you have any studies
14 of peripheral adenocarcinoma? Not all adenos.
15 Peripheral adenos as defined by Oscar Auerbach. He
16 didn't That's because Oscar Auerbach has the
17 studies that's on this issue Okay. Let's -- just
18 a couple of points about the issue of what happens
19 in population of smokers when they quit? When they
20 quit smoking, the risk for smoking goes down. It
21 goes down with time.

22 And we have examined Dr. Yergin about when
23 Mr. Carter's cancer started. He said that based
24 upon the American Cancer Society Textbook of
25 Oncology, his best estimate would be four years, but

1 he says nobody knows. Nobody knows It could have
2 been four years, it could have been ten years
3 Nobody knows

4 What we do know from epidemiology which
5 cannot be applied to the individual, but we do know
6 from epidemiology that in populations at large,
7 people who quit smoking after five to ten years, the
8 risk of developing lung cancer is about the same as
9 if they'd never smoked If Mr Carter quit smoking
10 in 1972, he would have been in that population that
11 would have a risk for developing lung cancer over
12 nonsmokers

13 Finally -- Your Honor, could we perhaps
14 get up and stretch a little bit. It's getting warm.

15 THE COURT Sure.

16 (Brief recess)

17 THE COURT: Please be seated.

18 Mr. Sheffler.

19 MR SHEFFLER Thank you, Your Honor.

20 Let me talk a little bit about the statute
21 of limitations. This argument about when this
22 cancer started in terms of when Mr. Carter should
23 have known or when he did know that he had an
24 injury

25 Now, under the law as the judge will

1 instruct you, if you find that Mr. Carter knew he
2 had lung cancer and thought it was caused by his
3 smoking before February 10, 1991, you must find for
4 American That's the law

5 And there's no debate that when Mr. Carter
6 started coughing up blood in January or early
7 February of 1991 he knew that it was caused by
8 smoking, and he quit smoking at that time. What
9 Mr. Wilner has tried to argue is that Mr. Carter had
10 no idea why he was coughing up blood, even after he
11 went to see his doctors, until after his
12 bronchoscopy Of course that flies in the face of
13 the evidence from Mr Carter, from his doctors, and
14 it defies common sense There is no requirement in
15 the law that you must wait until you have a
16 pathologic diagnosis to bring a suit. Therefore,
17 your time to bring that suit starts running when you
18 knew or you should have known through reasonable
19 diligence that you have an injury.

20 Let's look at the evidence about what
21 Mr. Carter knew about his lung cancer. After
22 coughing up blood and stopping smoking, Mr. Carter
23 first went to see Dr Decker on February 4. He had
24 an x-ray at the time. The x-ray showed a mass in
25 the upper left lobe. Dr. Decker then sent him

1 immediately to Dr. Yergin. And Dr Yergin's records
2 show they saw him on February 5, 1991. And they
3 also show, Dr Yergin's records show someone from
4 Dr. Decker's office called and said Mr. Carter was
5 coming and he had a lung tumor. Lung tumor. This
6 is February 1995 (sic) from the Joint Exhibit No. 1.
7 You can see 2/5/91 someone from Dr. Decker's office
8 called and said lung tumor. February 5

9 Now, when Mr Carter saw Dr. Yergin, he
10 already knew about the x-ray He'd had that x-ray
11 done by Dr. Decker. Dr. Decker told him that he had
12 a lung mass, and he sent him with his x-ray to
13 Dr Yergin

14 Dr. Yergin, who came and testified here at
15 trial -- he was the first witness And he was also
16 testifying as Dr. Carter's treating physician as
17 well as being retained by Mr Wilner to testify as
18 an expert witness And he testified when he saw --
19 when Dr. Yergin saw Mr Carter on February 5, he had
20 three possible diagnoses: Number one was cancer,
21 number one two was cancer, and number three was
22 cancer. That's what he said. That's what he --
23 because with a lung mass and hemoptysis like this
24 man, that's what a doctor, a pulmonologist like
25 Dr. Decker would suspect.

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1 He also testified that he wasn't going to
2 preach, he wasn't going to yell or scream at his
3 patient that he had lung cancer, but he then
4 testified at this trial that if on February 5
5 Mr. Carter had asked him what caused him to cough up
6 that blood, whether the mass in his lung was a
7 cancer, Dr. Yergin testified, I would have said yes.
8 He wasn't going to lie to his patient.

9 Can there be any doubt that Mr. Carter,
10 who had been coughing up blood, who was so concerned
11 he had taken a medical book and looked up lung
12 cancer to check out the symptoms, who went to
13 Dr Decker, had a chest x-ray with a mass in his
14 left upper lobe, can there be any doubt that he
15 didn't ask the treating doctor what do you think it
16 is?

17 Well, when I reminded Dr Yergin of his
18 deposition testimony, Dr Yergin also agreed that,
19 quote, I certainly told him most likely this was a
20 tumor, but hopefully it was an early stage That is
21 also on February 5, 1991, four years, five days
22 before Mr: Carter brought suit

23 Dr. Yergin further testified that
24 Mr. Carter was obviously depressed at the February
25 5th appointment. Dr. Yergin said, and I quote, I

1 think he did feel that he probably had lung cancer,
2 yes, and it was reasonable for him to make that
3 conclusion Same date, February 5

4 And Mr Carter has testified as well to
5 that belief As you know, his deposition was taken
6 in the case before trial before this issue of
7 statute of limitations was raised, and at that time
8 he testified under oath that in his mind after his
9 appointment with Dr. Decker on February 4, 1991,
10 when he was told about his upper lobe mass in his
11 mind he knew he had lung cancer

12 Mr Carter reviewed his testimony, his
13 deposition testimony, within the month, was able to
14 make any changes, he wanted to that testimony He
15 made changes but he didn't change the testimony
16 about when he knew he had lung cancer. Mr. Carter
17 knew more than four years before his suit was filed
18 that he had lung cancer, and for that reason alone,
19 you should return a verdict for The American Tobacco
20 Company.

21 Now, there's another issue that we need to
22 address that the evidence will address during the
23 scope of the trial, and that is the evidence which
24 discusses why Mr. Carter didn't quit until 1991.
25 The evidence clearly shows that he knew long before

1 that about the dangers of smoking, about the
2 association of lung cancer with smoking And he
3 knew of his chances for disease and death. In fact,
4 he thought his chances were one out of three. So
5 he -- but he also claims in this case that we should
6 have told him, American should have told him before
7 1969 smoking was addictive.

8 The evidence is that if American had said
9 before 1969 that smoking was an addiction or
10 nicotine was a drug of addiction, they would have
11 been saying something that was contrary to the
12 medical and scientific communities of that time.
13 There was no controversy over this one The medical
14 and scientific communities had adopted a definition
15 of drug addiction that was very clear, concise and
16 very explicit in what it required to be a drug of
17 addiction Cigarette smoking simply didn't meet
18 it

19 As Dr. Thompson explained the '64
20 definition which was outlined in the Surgeon
21 General's report but was not authored by the Surgeon
22 General's report. It was actually authored by the
23 World Health Organization, but it nevertheless
24 reflected what was the current thinking in the '60s;
25 and it did go through very explicitly the criteria

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1 that meant smoking could not be a drug addiction,
2 that smoking was a habit

3 Now, the definitions of addiction and
4 habituation, dependence, whatever you want to call
5 it, has changed It's changed over time, but at
6 this time it was the definition and it was based
7 upon the behavior that was observed at the time It
8 was based upon the differences between alcohol and
9 drugs like caffeine and nicotine They differ.
10 There's no disagreement about that Alcohol makes
11 you drunk Caffeine doesn't, nicotine doesn't.
12 Alcohol makes you have significant withdrawal when
13 you stop, physical withdrawal that can be
14 life-threatening You have to hospitalize patients
15 as Dr. Thompson described for you.

16 Nicotine causes frustration, irritation,
17 irritability, but no physical symptoms and signs
18 other than perhaps a decreased heart rate The same
19 kind of frustration you expect when you give up any
20 well-liked, reinforced habit that you've done for
21 many, many years and many, many, many times.

22 And that's why the '64 report made a
23 distinction between the two. It was based on the
24 behavior, the critical distinction, of course, being
25 intoxication, and the fact that at that time it was

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1 believed that people who used intoxicating
2 substances did so because they had some psychiatric
3 problem that they needed to alleviate, they needed
4 to escape from.

5 Now, they reviewed the very documents that
6 Dr. Feingold had identified as discussing nicotine
7 as an addiction Remember the document by Head?
8 The documents by Johnson that were done way back in
9 the '40s Well, those documents were cited in the
10 '64 Surgeon General's report

11 So there was no issue, no controversy at
12 this time, and that's why Mr Wilner and
13 Dr Feingold brought up these so-called secret
14 documents, secret documents from Switzerland, the
15 so-called British American Tobacco documents, and
16 tried desperately to argue that these documents
17 would somehow have made a difference to the Surgeon
18 General's committee. That these documents if they
19 had been communicated to the Surgeon General's
20 committee, the Swiss research would have changed
21 things dramatically. The conclusion would have been
22 different.

23 Well, of course the documents, these HIPPO
24 studies, were studies of rats. Studies of rats that
25 were given nicotine. And the reason why they were

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1 given nicotine is they were trying to find out what
2 was the beneficial effects of nicotine. Was
3 nicotine really a good stress reducer. If so, this
4 would have been very helpful, very helpful from a
5 perspective of arguing that there were good and
6 beneficial reasons for nicotine

7 And in fact, that's exactly what the
8 research was designed to do Find out how nicotine
9 could be used as a stress reducer The research had
10 nothing to do with showing nicotine was
11 intoxicating, nor did it, nor could it. Nicotine is
12 not intoxicating

13 The research had nothing to do with
14 behavior of humans when withdrawing from the
15 substance It wasn't meant to It would have had
16 no effect on the Surgeon General's committee because
17 it had nothing to do with the definition the Surgeon
18 General applied. The research really went nowhere
19 as well because the adrenocortical effects, as
20 Dr. Thompson told you, the Surgeon General found had
21 nothing to do with nicotine use in man.

22 But nevertheless we spent a lot of time
23 talking about it, so I want to go quickly over these
24 BAT, so-called secret documents. First of all,
25 Dr Feingold testified that all the documents in

1 Exhibit 10 were secret, had first come to light in
2 1995, had been held close to the vest and nobody
3 knew anything about them And he talked about the
4 Strickman filter Remember that this was the filter
5 Mr Wilner was talking about earlier.

6 The Strickman filter was a secret filter,
7 supposedly devised by the British American Tobacco
8 Company and kept secret until finally disclosed in
9 1995 Well, the problem is the Strickman filter was
10 developed by Robert Strickman from New Jersey. And
11 Robert Strickman developed it with Columbia
12 University It had nothing to do with British
13 American Tobacco Company

14 The Strickman filter was an abysmal
15 failure, and its failure was widely publicized all
16 over the country. It was publicized in the
17 Jacksonville newspapers. Of course, this was in
18 1966, but nevertheless there were congressional
19 hearings about it. There was an NBC story,
20 television story. Dr. Feingold's claim that this
21 Strickman filter was a secret was based upon two few
22 documents and too much speculation.

23 The same way his claim that the mouse skin
24 study paintings that were done at Harrogate
25 Laboratories, he said that was never published.

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1 Well, it was published, as you will see in the
2 exhibits: Exhibit 16, British Journal of Cancer,
3 Exhibit 18, the TRC Flip to the back and you'll
4 see all of the different mouse skin painting studies
5 done by Harrogate labs published in journals around
6 the country Scientific journals, medical journals.
7 This was not secret. Dr. Feingold didn't know that.
8 He thought that it first became public in 1995.
9 Again, Dr. Feingold had a few documents and was
10 speculating about what they would mean, what they
11 might mean

12 And he was speculating as well when he
13 said the documents about this HIPPO project were
14 withheld from the Surgeon General because they
15 implicated cigarette smoking as an addiction. That
16 again was speculation. The reason why the documents
17 were withheld from the Surgeon General's committee
18 had nothing to do with fears that they would somehow
19 lead the Surgeon General to think there was an
20 addictive quality to nicotine

21 In fact, what happened was the British
22 American Tobacco Company, once they got the reports
23 from Battelle, had the TRC look at the reports. And
24 what did they conclude? They concluded the
25 appraisal of HIPPO said these reports represent a

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1 preliminary survey, preliminary survey, of some
2 actions of nicotine which it was considered might be
3 related to the cigarette smoking habit A
4 preliminary survey.

5 The appraisal goes on though and it says,
6 look at the very last line of comments The
7 information of these reports is not sufficiently
8 complete to justify any form of publication They
9 were preliminary reports That's the reason they
10 weren't given to the Surgeon General's committee

11 In fact, at the time the head of the
12 research development at British American Tobacco
13 Company was a guy by the name of Charles Ellis
14 Charles Ellis thought it would be a great idea to
15 get these HIPPO reports to the Surgeon General
16 committee because he was convinced that the Surgeon
17 General committee would find the beneficial effects
18 of nicotine to be something helpful for the tobacco
19 companies. So they wanted to get this to the
20 Surgeon General actually as this letter shows
21 You see the cable in the middle is reproduced where
22 it says, your letter, TRC consulted scientists
23 advises it's too early to submit Battelle reports to
24 the Surgeon General's committee. That's exactly
25 what we saw. They said it's not worthy of

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1 publication, but we think they will agree that the
2 continuation of research will be useful

3 Oh, Charles Ellis, again, the research
4 director We think the beneficial effects of the
5 nicotine, but agrees further investigation is
6 desirable before publication. It goes on, the
7 letter itself says, Charles's view is that as the
8 situation is now developed, it would be wise for
9 B and W not to take the initiative of submitting
10 anything to the Surgeon General's committee but --
11 now this is the important part. And this is in
12 Exhibit 10 of the plaintiffs' exhibits -- but rather
13 wait and hope that the committee, the Surgeon
14 General's committee, will ask the individual
15 companies for further details of their research
16 work. And then should this happen, it would give B
17 and W the opportunity of submitting the Battelle
18 work and the work on the Avalon filter.

19 So what they did was they had this
20 information. They thought it was helpful because it
21 showed some beneficial effects of nicotine. They
22 wanted to give it to the Surgeon General but it was
23 incomplete. And their own scientists thought it was
24 pretty lousy stuff.

25 So how could they get it to the Surgeon

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1 General? They just couldn't volunteer it. They
2 were hoping the Surgeon General would ask them for
3 it, then they could give it to them. They could
4 give it to them without criticism as further work on
5 both Battelle work and the Avalon had to be done,
6 the work would be imbued from detailed criticism.
7 That's if the Surgeon General would request it So
8 they were hoping he would ask it. These weren't
9 secretly withheld documents They were in fact
10 trying to get them to the Surgeon General, but it
11 didn't work

12 Now, this whole project, HIPPO, resulted
13 in further research that basically went nowhere, but
14 as well as some discussion by Addison Yeaman. Now,
15 who is Addison Yeaman? He was the guy who wrote
16 that memo that Mr. Wilner showed you toward the end
17 of his arguments. Addison Yeaman was a lawyer.
18 There's no suggestion in this trial that Addison
19 Yeaman did any research on nicotine at all. There
20 was no suggestion he did any research in addiction.
21 There's no suggestion that Addison Yeaman knew a
22 thing about nicotine or addiction.

23 Obviously he didn't know anything about
24 the scientific and medical community's definition of
25 addiction at the time, because he thought nicotine

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1 was addicting, and the Surgeon General said it can't
2 be addicting You got to have intoxication for it.

3 Now, Addison Yeaman, the lawyer for the
4 tobacco company in 1966 or whenever this document
5 was authored, had some musings about nicotine for
6 whatever reason. We don't know But to try to
7 speculate that these musings would have influenced
8 the ten-member Surgeon General's committee when it
9 assessed nicotine and it applied the definition of
10 drug addiction is speculation at the most extreme.

11 The committee had on it Maurice Seevers.
12 Maurice Seevers was the person who authored the
13 definition of drug addiction that was used by the
14 World Health Organization. He wasn't going to chuck
15 his deposition -- his definition for some musings by
16 a tobacco company lawyer. There can be no question
17 that the definition of addiction, drug addiction in
18 1964 was by intoxication. There can be no question
19 nicotine is not intoxicating

20 You apply the same definition to
21 everything we know about nicotine today. Nicotine
22 is still not defined as an addiction. The
23 definition won't let you because it requires
24 intoxication. It requires physical withdrawal,
25 requires things that do not occur with nicotine or

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1 caffeine Now, it is difficult to quit cigarette
2 smoking Nobody said it wasn't It's difficult to
3 quit today It was difficult to quit in 1964. That
4 behavior is the same.

5 People experience frustration, people
6 experience irritation, people are upset when they
7 quit smoking They miss their cigarettes, they miss
8 their habit Of course. That's not different today
9 than it was in '64. People experience the same
10 pleasant effects with smoking today as they
11 experienced in 1964

12 And what causes those pleasant effects?
13 The fact you have receptors in your mind. The fact
14 that you have receptors that will be activated by
15 nicotine. That's true We've discovered that.
16 Does that mean we didn't know that nicotine gave you
17 pleasure before? Of course not. They knew in 1964
18 that nicotine was pharmacologically active. They
19 knew it was psychoactive They didn't know the
20 science of receptors, that's new. But that doesn't
21 change the behavior

22 In fact, you have receptors in your brain
23 for caffeine You've got receptors in your brain
24 for chocolate. You've got receptors in your brain
25 for everything that's psychoactive that you ingest.

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1 And everything that's psychoactive means everything
2 that you can realize as a pleasure Dr. Thompson
3 explained this to you.

4 The idea that we have receptors is not
5 something that is far -- that is new. We knew about
6 receptors for a long time The fact of the matter
7 is people never defined a drug as being a substance
8 that causes receptors in the brain to activate or
9 not activate That's not the definition because
10 anything that gives you pleasure would be an
11 addiction if you use that definition So receptors
12 are an interesting sidelight, but there's not a lot
13 to do with the behavior

14 Now, let's talk a little bit about the
15 behavior that is involved in cigarette smoking The
16 behavior hasn't changed in terms of quitting, the
17 behavior hasn't changed in terms of withdrawal;
18 behavior hasn't changed in terms of whether you like
19 to smoke or you don't like to smoke So the
20 behavior is the same between 1964 and 1988.

21 What has changed? Well, obviously what
22 has changed is the definition. And regardless of
23 what definition or label, you want to apply it to
24 smoking. You can call it addiction, call it a
25 habit, call it dependence, call it what you will.

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1 It doesn't really matter in this case because in
2 this case the issue is whether or not Mr. Carter
3 would have quit smoking if he had been warned by the
4 American Tobacco Company prior to 1969

5 Under the Surgeon General's committee's
6 definition, half of the people who have ever smoked
7 cigarettes have quit Half of the people who have
8 ever smoked cigarettes continue, half quit.

9 According to Dr. Feingold's interpretation
10 of the '88 Surgeon General's committee's report, all
11 of those people were addicted That's what he said
12 If you smoke more than five cigarettes a day, you're
13 addicted.

14 According to Dr. Thompson's view of his
15 practical experience in dealing with drugs, none of
16 those people were addicted, because he still thinks,
17 because what he treats are people who have serious
18 problems with drug use that have to be hospitalized,
19 that need his treatment. He doesn't treat cigarette
20 smokers unless they have an underlying problem that
21 they're seeing him about, then he will. So he has a
22 different definition. He has a more pragmatic
23 definition for his line of work. Psychiatrists, and
24 that's what he deals with, he deals with addictions.
25 Addictions to hard drugs, addictions to alcohol that

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1 are different in kind from smoking, using caffeine.

2 So if the definition really doesn't make
3 any -- make any distinctions between people who quit
4 smoking and people who don't quit smoking, and we've
5 seen that because whether you call them all addicted
6 or none addicted, and the definitions will apply
7 almost uniformly to everybody because everybody
8 basically smokes the same way. So what is the thing
9 that distinguishes between people who quit and
10 people who don't?

11 I told you on opening statement that we
12 would prove to you that the thing that distinguished
13 it between quitters, between people who don't quit
14 is motivation I told you that was going to be
15 proven to you through the testimony you've heard,
16 through the witnesses you've heard, and through the
17 testimony of Mr. Carter himself.

18 And we have proven that to you.

19 Dr. Thompson explained to you the importance of
20 motivation and changing behavior, any behavior.

21 Dr. Feingold, he didn't disagree. Remember,
22 Dr. Feingold's four keys to quitting: One,
23 information; two, motivation; three, intervention;
24 four, therapy

25 Now, you can throw out intervention and

1 therapy from smoking because 90 percent of the
2 people who quit smoking do so without any
3 intervention or therapy That's what the Surgeon
4 General's report in '88 said. So you can throw
5 those two out So you're just looking at
6 information and motivation.

7 Information The information about
8 smoking and lung cancer, smoking and disease, has
9 been around for many, many years Mr Carter was
10 well aware of it. He had information. Dr. Feingold
11 didn't investigate Mr Carter's information at the
12 time he saw him, but he didn't investigate his
13 motivation either That wasn't Dr. Feingold's
14 purpose. Dr Thompson did investigate what evidence
15 we have of Mr Carter's motivation with respect to
16 his smoking before 1991 as regards to other
17 behaviors that he engaged in

18 Plaintiffs says that the warning that
19 should have been given to consumers should have been
20 filled with dire consequences, should have been
21 motivating in terms of the information about smoking
22 such that Mr. Carter would have been more motivated
23 to quit.

24 What you have to assess is, has there been
25 proof, has there been proof in this case that

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1 Mr Carter was going to internalize any information
2 about smoking. And it had to be true information.
3 I mean, you couldn't tell Mr Carter in 1969:
4 Mr. Carter, if you smoke cigarettes, there's a
5 hundred percent certainty you're going to get lung
6 cancer and you're going to die by age 60. You
7 couldn't do that Why? Because it wasn't true.
8 You can't give those kind of warnings If you did,
9 would Mr Carter believe it?

10 That's a decision that still has to be
11 made in that circumstance because Mr Carter was an
12 intelligent man He was well aware of the risks. He
13 knew that 90 percent of people who smoke cigarettes
14 don't get lung cancer Actually he thought that the
15 risk of disease was one in three, so maybe he didn't
16 know that statistic. So I guess that statistic
17 really wouldn't have motivated Mr. Carter to quit
18 smoking.

19 What was the type of information that
20 Mr. Carter got over the years? Well, he did see the
21 Yul Brynner video, the infomercial, where Yul
22 Brynner was saying I've got lung cancer. I'm dying.
23 He did see that.

24 He also saw the Perry Mason -- or the
25 prosecuting attorney in the Perry Mason show. He

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1 saw that videotape too Those were messages that
2 were made -- that made an effect on him Effect at
3 least enough that he remembered them 30 years later.
4 But not enough to make -- motivate him to quit.

5 Mr Wilner says that we should hire Yul
6 Brynner We should hire others to get this message
7 out in that fashion Well, that's not the job of
8 the manufacturer. The job of the manufacturer is
9 not to persuade people to quit The job of the
10 manufacturer is to give them information That's
11 the job of the manufacturer

12 The American Cancer Society was trying to
13 persuade people to quit That's why they ran
14 motivational messages that people could internalize
15 But the job of the manufacturer is to provide the
16 information. To provide the information that the
17 consumer desires, that the consumer should have so
18 that he is informed about what is known about the
19 product at the time

20 We went through -- that's why we went
21 through all that state-of-the-art information. What
22 was known about the product at the time? That is
23 what the tobacco company should be communicating.

24 Now, Mr Carter testified over the years
25 he had that information about smoking and health.

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1 He was well read. And while he said he couldn't
2 remember different articles from Reader's Digest, he
3 did say he read it throughout his life Reader's
4 Digest is in evidence, so are articles from Life
5 magazine, articles from Newsweek, articles from the
6 Florida Times-Union They will all be here for you
7 to review Mr. Carter remembered reading about the
8 Surgeon General's reports in the Florida
9 Times-Union. He remembered reading about many
10 different articles, so many that he finally said,
11 I'm either going to have to quit smoking or give up
12 reading. So he gave up reading.

13 A number of articles that discussed health
14 risks of smoking, lung cancer, emphysema were shown
15 to Mr Carter He didn't say he didn't see them.
16 What he said was he couldn't remember so long ago.
17 This was probably about 25 to 50 years ago. He
18 couldn't remember what he saw and what he didn't
19 see.

20 But he was well read, and we know from
21 polls that by 1954, almost 90 percent, almost 90
22 percent of the population have heard or read
23 something recently to the effect that cigarette
24 smoking may be a cause of lung cancer. That's a
25 pretty big percentage for 1954.

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1 Now, Mr. Carter also had information from
2 other sources, important information. He had
3 information from his physician -- from physicians
4 warning him throughout his life. He had information
5 from his family members. He had information from
6 those close to him. This is the type of information
7 which would be most motivational, far more
8 motivational than advertisements. Mr. Carter
9 couldn't remember anything that he read about
10 smoking in the '50s. He also did not testify in
11 this case about any advertisements that he saw in
12 the '50s, '60s, '70s.

13 Mr. Carter started smoking Lucky Strikes
14 because his aunt smoked Lucky Strikes. He continued
15 smoking Lucky Strikes because he liked them.
16 Advertisements were not part of Mr. Carter's -- this
17 is part of Mr. Carter's motivation -- advertisements
18 certainly would not compete with the information
19 that he was getting from his wife, he was getting
20 from his son, getting from his daughter,
21 stepdaughter.

22 According to his wife, she tried
23 everything she could to motivate him to quit
24 smoking. She didn't tell him to quit smoking like
25 she told him to hang up his socks. She was telling

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1 him to quit smoking because she cared deeply about
2 it, because she knew it was a risk for disease and
3 death And she did everything she could to motivate
4 him to quit She cut out newspaper articles and
5 gave them to him

6 His son sent him pictures of diseased
7 lungs to try to get him motivated to quit. His
8 stepdaughter urged him to quit repeatedly Now,
9 these are warnings that come from those that are
10 closest These are very personal warnings These
11 are the warnings that would motivate you if anything
12 was going to motivate you

13 When doctors told Mr. Carter about the
14 diseases -- smoking causes diseases, they weren't
15 telling him anything he didn't already know
16 Dr. Rood, Dr Jones But he didn't heed those
17 warnings He did not change his behavior as a
18 result.

19 In fact, he never asked any of his doctors
20 about smoking and disease. Why? Because he
21 testified he already knew He went to Dr. Lampier.
22 Why did he search him out? He said he was his kind
23 of doctor. Because he was a smoker and he wasn't
24 going to preach to him about smoking. Mr. Carter
25 wasn't interested. He didn't want to hear that.

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1 Did Mr Carter ignore all of this
2 information because he was addicted? Is that the
3 reason why he didn't go to the stop-smoking clinic
4 he set at the FAA? Was that the reason he told his
5 secretary if the withdrawal clinic calls tell them
6 I'm out?

7 Mr. Carter laughed off the suggestion that
8 he participate in the Great American Smoke-out. Was
9 that because he was addicted? The evidence in this
10 trial from Mr Carter and those who knew him is that
11 he was using addiction as an excuse

12 When he said to others, I can smoke these
13 cigarettes. There may be a one-in-three chance, but
14 it's not going to happen to me That was a
15 rationalization. The same way he was rationalizing
16 his behavior by saying he was addicted.

17 Now, in the '80s there came a time when he
18 got a prescription for Nicorette gum. And after
19 trying them a couple days, he put them in his table
20 near his bedside and he wasn't motivated to use them
21 again until 1991.

22 And it's interesting Mr. Carter still
23 chews Nicorette gum. He was chewing it while he was
24 testifying on the stand, but as we've learned, he's
25 getting no pharmacological effect from it. He cuts

1 them into four quarters. One quarter is about the
2 same as taking too puffs on a cigarette. And he
3 often uses it while he's drinking coffee and while
4 he's eating foods. And according to the Nicorette
5 insert, that eliminates any pharmacological effect
6 it might have. They tell you you're not supposed to
7 do that.

8 Now, obviously Mr. Carter either didn't
9 read the insert or he ignored it, because he also
10 testified that he smoked cigarettes while using
11 Nicorette gum which is something you're not supposed
12 to do. His dependence on Nicorette -- and he says
13 that he needs it. That dependence is psychological.
14 That doesn't mean it would be easy for him to quit
15 using Nicorette. It would not. It would take
16 motivation.

17 Mr. Carter would also have to have had
18 motivation to quit smoking before 1991. His
19 stepdaughter, Wendy, told us in deposition that
20 Mr. Carter and his wife Marjorie used to talk a lot
21 about quitting smoking, but they didn't do very much
22 about it. This is the same man who when he was
23 motivated to succeed in his work got nine different
24 promotions. He was a very determined individual.
25 He was successful when he was motivated to do it.

1 I think there's a striking analogy between
2 Mr Carter's attitude towards his doctor's advice
3 with respect to dieting and his attitude toward
4 smoking. Doctors throughout his adult life,
5 Dr. Jones, Dr Yergin, Dr. Wachtel, even
6 Dr Feingold told him he needed to watch his diet
7 because the risk of heart disease, heart attack.
8 But Mr Carter hasn't stayed on that diet. He's
9 rationalized the risk of heart attack away just like
10 he rationalized the risk of lung cancer away before
11 1991

12 Package insert and chocolate chips cookies
13 isn't going to make Mr Carter motivated to stay on
14 this diet even though he knows he is at risk for
15 heart attack and death because of his high-fat
16 diet That's what Dr. Yergin told us

17 The package insert from Lucky Strike
18 cigarette manufacturer would not have motivated him
19 to stop smoking before 1969 either.

20 There's no question Mr. Carter became
21 motivated when he started coughing up blood.
22 Everyone agrees he stopped smoking and he never
23 started again. When he started coughing up blood,
24 he knew he had lung cancer; he believed it was
25 started by smoking.

1 But before that time, Mr. Carter, even
2 though he knew he had a one in three chance, was not
3 going to stop smoking because he believed it wasn't
4 going to happen to him

5 Now, can it be seriously argued that a
6 warning by American before 1969 would have made him
7 quit smoking? It would have to have convinced him
8 that he was going to get cancer, convinced him that
9 there was no doubt he was going to get it You
10 can't rationalize it away. And no one could have
11 predicted that in 1969

12 What could American have told Mr. Carter
13 that his wife didn't tell him? What could American
14 have done to motivate Mr Carter when his own wife
15 couldn't motivate him to quit smoking, his children
16 couldn't motivate him to quit smoking. His doctors
17 couldn't motivate him to quit smoking.

18 I think this case is best summed up by
19 Mr. Carter's own testimony. He was asked at trial:
20 You're the only person that could make the decision
21 for you to quit; isn't that right? And his answer
22 was, that's correct.

23 And you never made that decision before
24 1991, did you?

25 Answer No, I did not.

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1 No one is blaming Mr. Carter for not
2 making that decision before 1991 It should be
3 perfectly clear There is no one saying Mr. Carter
4 did not have the right to live his life the way he
5 wanted to and to make the decisions about using
6 tobacco the way he wanted to. That was his
7 decision. That was his right. No one is blaming
8 him for it, but no one should blame the American
9 Tobacco Company for his decision either

10 Now, I want to thank you for your
11 patience. I know it's been long, but Mr. Wilner is
12 going to address you again in just a couple minutes.
13 And I don't -- this is it I'm not going to talk
14 anymore to you. I don't get a chance to respond to
15 Mr. Wilner, even though I want to. That's the way
16 the rules work. Since the plaintiff has the burden
17 of convincing you, he gets to go first and last as
18 His Honor has said.

19 And I have no idea what Mr. Wilner will
20 say to you, and so I'm going to ask you to listen
21 very carefully to what he says. And ask yourself
22 given what you heard from Mr. Carter and what you
23 heard from those close to Mr. Carter, would a
24 warning by the American Tobacco Company before 1969
25 have made Grady Carter quit smoking?

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1 That's what the plaintiffs must prove to
2 you to succeed in this case. And they haven't
3 proved that. And, therefore, you should return a
4 verdict for the American Tobacco Company

5 Thank you very, very much.

6 THE COURT: Thank you, Mr. Sheffler.

7 MR WILNER. Your Honor, it will take me a
8 few minutes

9 THE COURT: We're going to stand in recess
10 until five after.

11 THE BAILIFF All rise. Court is recessed
12 until five minutes after 12 by this clock.

13 (Jury exits and recess at 11:55 a.m)

14 (Change of reporters)

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P R O C E E D I N G S

Thursday, August 8, 1996

12:05 p.m.

- - -

THE COURT Mr Maxwell?

MR MAXWELL Yes, Your Honor. We have one piece of evidence that we needed to do some housekeeping on That's been done. It's Plaintiffs' Exhibit 31, which we move into evidence at this time

THE COURT All right

MR PRICHARD No objection, Your Honor.

THE COURT Very good It will be marked and admitted as Plaintiffs' No 31.

(Plaintiffs' Exhibit No. 31 was received into evidence.)

Mr. Wilner, are you ready to proceed?

MR. WILNER: Yes, Your Honor.

THE COURT: Mr. Sheffler?

MR. SHEFFLER: Yes, Your Honor.

THE COURT: Mr. Forte, bring the jury in, please.

(Jury present at 12:08 p.m.)

THE COURT: Please be seated. Rebuttal argument, Mr. Wilner.

MR. WILNER: May it please the court.

1 THE COURT: Yes, sir

2 MR WILNER Well, I'm back again It's
3 the last time, but I have 30 minutes and after that
4 there will be silence at least for me Maybe, of
5 course, his honor will then instruct you in the law,
6 and your job will begin. Our job will be over.

7 And I sat through two hours of nonsense
8 just now, and my goal or my reward for sitting
9 through those two hours of nonsense is to be able to
10 get up here and say a few things and try and clear
11 up the mud that has now infected the water again.

12 I heard some things that made my ears
13 buzz One was Mr Sheffler apparently now is saying
14 the job of the manufacturer is to provide
15 information. When did that -- I mean, I agree,
16 sure. Where is the information from the
17 manufacturer? That's what I would really like to
18 see, because we all know that there was nothing but
19 fight until the Congress required a package label in
20 1966 There was no information. I shouldn't say
21 that. There was bad information. There was wrong
22 information.

23 This is Mr. Hiemann much later in 1966.
24 We believe our product -- 1986 -- we believe our
25 product is not injurious to health. The Surgeon

1 General is dead wrong

2 We don't have to give you a stack of
3 articles this high for you to get an idea of what
4 this venomous stuff was doing to the media, to the
5 public and to everybody who would listen.

6 Now, a couple of things, one, apparently
7 the center of their case -- well, see, they admit
8 nothing Cigarette companies admit nothing. That's
9 rule number one. They will never admit anything.
10 They won't admit what day it is. They will not
11 admit -- first they'll say, well, cigarettes don't
12 cause, don't cause any disease Here's their
13 interrogatory in this case 1996 Hello, wake up,
14 reality check here

15 This is what they say. American -- they
16 can't decide who to call themselves. They are
17 really Brown and Williamson, but they want to be
18 American sometimes -- further states that it has not
19 been scientifically established that cigarette
20 smoking is a cause of lung cancer or any other human
21 illness or injury. Not only the cause, a cause.

22 1996, this is what they're willing to come
23 in and say. And, you know, where is the
24 accountability? I mean, when is it going to stop?
25 How are we -- how can we deal with stuff? I mean,

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1 how many doctors does it take? Maybe one dedicated
2 good doctor.

3 It frightened me to hear that
4 Mr O'Hanley, Dr. O'Hanley was the expert we should
5 follow in this case That is a terrifying thought.
6 Sometimes, you know, and it's interesting to hear
7 that, too. Sometimes you have to see the person not
8 just take the credentials, because some people have
9 credentials, but when you talk to them not all
10 doctors are the same. Some backup what they say and
11 maybe some don't Some maybe have another agenda,
12 maybe they are biased, who knows what, and some
13 don't. And some maybe come at it from a totally
14 different perspective.

15 I mean, maybe Dr. O'Hanley has some
16 ultimate theoretical idea that no cause can ever be
17 proved so that we are going to have to wait -- the
18 last thing I asked him, I said, When are we going to
19 get the answer? He said, Grady Carter will be dead
20 then I hope not, but we'll all be dead then.

21 Unfortunately this court is here today. I
22 mean, we can't wait until the ultimate answer. And,
23 you know, it's so interesting that that same
24 business about, Let's wait, let's wait, let's not do
25 anything, let's not decide, has been going on in the

1 cigarette industry from day one. I mean, they have
2 been doing the same thing. It echoes in your ears,
3 the scary, scary refrain; more research, more
4 research is needed Don't do anything Really?
5 Don't save people's lives. Really?

6 Dr O'Hanley said -- remember the guy with
7 the -- John Snow with the cholera epidemic?
8 Actually that was Dr Feingold who told you about
9 it Dr. O'Hanley kind of jumped on it. That's
10 fine

11 The moral of the story was not that you
12 don't take the pump handle off. The moral of the
13 story was that although the bacteria wasn't known,
14 that the lives were saved, because the heroic doctor
15 went in there and he said, Gees, I don't know what
16 it is, but I know where it's happening and I bet you
17 that if I pull this pump handle off people don't die
18 anymore. He took the pump handle off. That's the
19 story. That's the story.

20 These guys, they want to sit around. They
21 would have gone up to John Snow and said, Oh,
22 Dr. Snow, we don't -- we can't prove that it's
23 anything. Just let them pump that water. Let them
24 keep dying. Now, that's wrong. It's wrong. It's
25 especially wrong when it's not used in good faith,

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1 but it's used to promote your product and to make
2 money And that's what it's been used for.

3 Now, let me show you this. Popular press,
4 1110, Why worry? You know, they want to hide
5 behind -- they want to hide behind the medical
6 establishment It's a crying shame that some of the
7 medical establishment let them do it It's a crying
8 shame. And I just want to put this on. This is --
9 flip to the next page for a second, Ginnie.

10 This is poor Dr. Charles Cameron. We
11 talked about this before He is a bird on a wire.
12 Flash 1954, the Hammond-Horn study, that powerful
13 study, the billion-to-one study that I showed before
14 has just come in; it's his own organization. He is
15 close to the cigarette industry. He is close. And
16 now he's being torn apart He's got his buddies
17 over here which say Dr Cameron, come on. They were
18 against the study from the start. And all of a
19 sudden his own study has come in and killed any idea
20 that there was going to be any hope for cigarettes.
21 That was the Hammond and Horn, and that's the
22 billion to one

23 Okay, so this is the weird, bizarre
24 behavior this man -- on the 17th of June, he says,
25 basically on the 17th of June, he basically

1 pooh-poohs the report, back here. And who grabs
2 ahold of
3 that -- next page, please -- but our old friend
4 Clarence Cook Little of the tobacco industry. He
5 picks right up on Charles Cameron and says, not
6 convinced, doubt

7 And I'll talk about Little in a second,
8 because he shows up -- he shows up in Addison
9 Yeaman's letter When Addison Yeaman says in 1963,
10 What are we going to do if the Surgeon General comes
11 out and says it's caused by, you know, cigarettes
12 are cancer's cause? And he says, Surely we won't go
13 back and use Dr Little's quote "not proven."

14 They knew it was a ruse back then. They
15 knew it was a ruse in the '60s. They are still
16 saying it. It's still here This disease is still
17 here. This not proven, not proven; it's still here
18 and it's wrong

19 Well, anyway, let's go back. So here's
20 Dr Little He picks up on Cameron. And now let's
21 go back to the first page of this incredible little
22 story, which has the title "Why Worry?" for God's
23 sake I don't know what that's supposed to tell.
24 Somebody who's in the throws of deciding whether
25 they want to stop smoking, why worry? Why worry?

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1 This stuff was all over the place.

2 And now Cameron says, two days later, he
3 says, Well, it may be a problem, but what's losing
4 five to ten years compared to having a good time?
5 The Cancer Society is supposed to make that
6 determination? Whoa, we are in trouble if the
7 Cancer Society is saying, What difference does it
8 make if you get cancer as long as you enjoy
9 smoking. That's crazy That's nuts. And that
10 shows there's something going on influencewise.

11 Now the next page Flip it around This
12 is fun So here he is again, Mr Bird on a wire.
13 Why isn't he happy? You know, the Cancer Society
14 study came in, you know, about a week ago But he's
15 miserable And the reason he's miserable is he
16 knows It's either his job at the Cancer Society or
17 his buddies at the cigarette companies

18 And so here it is, Dr. Cameron, on June
19 23rd he says, Well, it's complicated. You bet it
20 is. It was complicated for him Well, now I
21 agree. I thought it might be an indirect one, but
22 now I see in this report, yes, it is, okay.

23 And then they say, Well, but does this
24 contradict the statement that was issued on June
25 17th, which you said was not proof, which was

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1 Dr Little jumping on that baby. And he says, No,
2 my statement was not entirely proved, had reference
3 to cancer of sites other than the lung. Huh? That
4 wasn't in his June 17th This man is in trouble

5 Now, I don't care about Cameron I could
6 care less He's an illustration He was a
7 nothing He was a pawn. He was a big man in
8 credentials You make up your own mind whether a
9 man who was acting like this was a big man to listen
10 to

11 Every one of their doctors, all they did
12 was flap their jaws. They didn't come up with
13 death It's always been that way It's still like
14 this It's jaw flapping time It's I don't know, I
15 don't think so, could be something else, maybe not.

16 You know, this is what kills me. He put
17 on one of these things about, We're not sure of the
18 death rate. That's 37. We don't think it's really
19 going up. The guys, they said we don't think it's
20 really going up

21 Oh, boy, were they wrong Were they even
22 in good faith or were they just pathetic? I don't
23 know. I don't care

24 I'll tell you another thing, American
25 Tobacco wants to sit back and say, Well, we don't

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1 know We don't know We are just going to watch
2 these doctors Huh-uh They are experts

3 And I'll tell you another thing, if you
4 are the manufacturer, you make up your mind even if
5 you think there are two experts who are in
6 disagreement, you got to bet You got to bet on the
7 one that's right, you know I mean, especially if
8 the health of your customers is on the line.

9 You know, what did they have to lose?
10 Let's say they went along and they said, Okay, we
11 think it's deadly -- you can't find it? I'm
12 sorry -- we think it's deadly We think somebody
13 may be right So what do we do? We provide the
14 information What does that cost? A printer, a
15 couple printings And if it's true what they say
16 that everybody knew, listen to this, if it's true
17 what they say that everybody knew, why did they care
18 if they put a warning out? It wouldn't hurt their
19 sales, because everybody would have known.

20 Aha, we see the truth come out. They knew
21 darn well what would happen As soon as they
22 identified that product with danger coming from the
23 manufacturer it would hurt their sales.

24 Now by God, it would, because we saw much
25 later how the sales figures dropped after the

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1 information came out. And now we are down to half
2 the people that ever smoked I mean, we are at half
3 the rate. A lot of that's information. Information
4 is powerful We are a society that deals with
5 information We need it. We eat it alive.

6 And it's disgusting to hear somebody say
7 that after they didn't provide it, to say, Well, you
8 wouldn't have listened. I mean, you know, when my
9 father told me, when you made a mistake, I stood up
10 there and I said, Okay, I made a mistake. I'm
11 sorry. I'll take it I'll take the consequences.

12 Listen to this, listen to this disgusting
13 kind of talk Well, we didn't give you the
14 information, but you probably wouldn't have listened
15 to it if we had. It's like I built a house, I
16 screwed up the foundation and the house fell in.
17 And so they came looking for me and instead of
18 admitting it, I say, Well, the house probably would
19 have fallen in anyway. I mean, it could have fallen
20 in anyway

21 This isn't right. This has to be -- you
22 know, we have to shine the light of day in here. We
23 have to put the lamp on these guys and see what
24 their argument is.

25 You know, it's hard to even understand

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1 what their argument is They're saying they had a
2 duty They were the people in the position that
3 people trusted. And they didn't provide the
4 information, but, Well, who would have listened to
5 poor us? We are only The American Tobacco Company.
6 We are only Brown and Williamson. And if we had put
7 a serious warning like those Australian cigarettes
8 you saw which are serious, like a package insert
9 like anything else, oh, boy, the times would have
10 been a changing

11 Now, they put up a straw man and they say,
12 Look, you can't prove that Grady Carter would have
13 quit. Well, nobody can go back in time And I'll
14 tell you another thing -- put that on, 48

15 But nobody -- they say prove Grady Carter
16 would have quite, prove Grady would have quit, as if
17 I can go back in time. But I'll tell you one thing,
18 I don't have to prove that Grady Carter would have
19 quit, because this information also says something
20 else. It says, don't inhale; it says, smoke less;
21 it says, reduce the dose and you reduce the
22 response.

23 Remember we talked about dose response.
24 Powerful stuff. Why wasn't this given to
25 Mr. Carter? Can't we say that with this factual and

1 powerful information that he would say, Well, that
2 second pack, no, I'm going to leave it.

3 Well, I don't know, but he said that he
4 would I mean, what else can we use? He said that
5 he would A psychiatrist is going to tell us, go
6 back in time, a paid psychiatrist to psychoanalyze
7 Grady Carter Grady Carter said, I wanted this
8 information I sure did.

9 Then they want to play fast and loose with
10 when he got it. Well, he got it from one wife He
11 got it from his later wife. He got it from Millie.
12 He got it from his child All that stuff was in the
13 late '70s and '80s

14 I'm really interested with when his genes
15 got damaged and he got hooked and those things grew
16 in his brain That happened in the '50s and '60s.
17 And this case ends in '72. Why do they keep talking
18 about '84? Why do they keep talking about '90? Why
19 do they keep talking about his diet?

20 You know, I got so mad when I heard about
21 this diet business. You know, one of the classical
22 clinical criteria for nicotine withdrawal as stated
23 in the 1960 -- 1988 Surgeon General's report -- 136,
24 I'm getting ahead of you -- is, here are the
25 criteria, that classic criteria embraced by the

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1 whole world except the cigarette industry Craving
2 for nicotine, anxiety -- hard to read, I'm sorry --
3 irritability, anxiety, difficulty concentrating,
4 restlessness, decreased -- difficulty
5 concentrating -- how would you like your air traffic
6 controller to have that? Oh, my God --
7 restlessness, decreased heart rate, increased
8 appetite or weight gain, in fact, for sweets.

9 So here it is. They sell this product
10 that gets in his brain and hurts him. And when he
11 stops, it's well known that he has a weight gain.
12 And he says he gained 40 pounds and craves sweets.
13 And now they blame that on him. They say, Oh, Grady
14 Carter, you're a lousy guy, man; you wouldn't have
15 quit. Because now, poor man, when you do, you
16 hurt -- and for some reason, I don't know why, for
17 some reason you eat. Bad guy Bad product or bad
18 guy? It's so bizarre to suggest, to blame
19 Mr. Carter indirectly. To keep saying they are not
20 blaming him, that sounds like they are blaming him
21 to me. Not on his diet, awful, just awful.

22 What do I need to clear up? How much time
23 do I have left? Ten minutes left? Twenty, oh
24 good. I will be -- it will be precious, but I won't
25 spend it.

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1 Okay. I heard so much stuff about how
2 sanctimonious the cigarette industry became that
3 they hired all of these great doctors, I felt like
4 getting my violin out I really did. Boy, isn't
5 this wonderful they do all of this research Don't
6 believe a word It's carefully calculated public
7 relations stuff.

8 Is the actual research okay? Oh, yeah, I
9 mean doctors in a university are happy to get the
10 money. They used to be, not anymore, but they were
11 happy to get the money as long as they weren't doing
12 anything seriously that would come back and really
13 confirm the problem

14 So there were no Hammond-Horn studies.
15 There were no Wydner-Graham studies. There was a
16 bunch of peripheral stuff. I don't mean peripheral
17 adenocarcinoma -- strike that word. I hate that
18 word We will get back into peripheral
19 adenocarcinoma in a minute.

20 There were a bunch of other stuff about --
21 most of it didn't even concern smoking. You can go
22 through this thing that he trumpets and most of it
23 had nothing to do with cigarettes. It has to do
24 with other scientific things very good, very bad.
25 But what they are trying to do is get behind these

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1 universities and say, See, we are not that bad.
2 It's like the Mafia don getting into legitimate
3 business, so he can go to the functions and they
4 greet him as a legitimate businessman

5 But no, really, they were very careful not
6 to send out research that could come back and say,
7 Oh, my God, another confirmation of Hammond and
8 Horn. And they sure never came up with the
9 alternative They sure never came up with any study
10 that showed that any of these famous -- any of this
11 famous work that was done was wrong

12 All they did was have people, and
13 including Mr Cameron or Dr Cameron, who doubted
14 All right, so what I want to do is prove to you that
15 TIRC, this TIRC business that they got into in 1954
16 was pure PR And that is in Addison Yeaman's famous
17 internal letter, second page

18 And as we -- this is the insight into the
19 industry that no one had until recently. And, well,
20 we are starting on the second page though I'll
21 have -- we'll have to give you the context in the
22 first. It starts right up at the top. The TIRC
23 cannot, in my opinion, provide the vehicle for such
24 research -- the "such" means he was talking about as
25 of '63, they said, My God, what's going to happen?

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1 We are going to have to go out and actually do some
2 research. It was too late And the Surgeon General
3 had already, you know, they knew it was coming --
4 because it was conceived as a public relations
5 gesture A public relations gesture -- that Tobacco
6 Institute Research Council was a public relations
7 gesture.

8 And, you know, this Little character,
9 Clarence Cook Little that you saw on the last plate,
10 he was the one that was grabbing Cameron He was a
11 president. He was the scientific advisor for that
12 TIRC, that TIRC. And that stupid TIRC were also the
13 people that wrote the Frank Statement to the public
14 in 1954. So it's all one big problem. It's a
15 public relations gesture using science
16 inappropriately.

17 How did they get the scientists to go
18 along with them? I think maybe some of them went
19 along at first, just maybe they thought it would be
20 okay. Maybe they came up to them, and they had nice
21 looking people, you know, and -- just like here --
22 they get up and they are well-dressed and they open
23 their mouth and they talk. It doesn't always make
24 sense, but they give an appearance, an appearance, a
25 facade of credibility.

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1 And maybe some doctors say, Well, okay,
2 maybe they are, they really are interested in
3 finding out the truth, so I'll take the money and
4 I'll go along with them for a while And then
5 they'll go along and they'll -- and maybe they'll
6 get a statement out of somebody at first that says,
7 I'm not quite sure. Oh, great, well, plaster that
8 all over the world And then later what you don't
9 see is how that guy went back and did the research
10 and said, I don't know, guys, can't help you
11 anymore You know what came back in my lab; I can't
12 help you. They don't publicize that So very
13 bizarre to use TIRC to justify what they did. All
14 right.

15 This peripheral adenocarcinoma is going to
16 be the death of me, but I don't mean to be flippant
17 about it. I'm delighted it was not the death of
18 Grady Carter, but he's not out of the woods yet.
19 Let's do it one more time, because it's confused
20 again. So please put up 69 and we'll try it one
21 more time. I don't know what else to say.

22 The majority of peripheral
23 adenocarcinomas -- Dr. Feingold could care less
24 whether they are peripheral or central. Air goes to
25 all over the lung. The Surgeon General says they're

1 all due to it This is a cigarette company defense,
2 is what it is And I'll explain that one paper
3 because that paper related to a particular type of
4 cancer called bronchiole alveolar cancer, which that
5 doctor in that paper, Aurbach, lumps into
6 adenocarcinoma, and excuse his statistics, but
7 everybody else or most everybody else doesn't. And
8 since Grady Carter didn't have that kind of cancer,
9 we don't even care about it.

10 But this is -- back to this. This is the
11 Grady Carter situation period It says -- this is
12 peripheral included. This is it This is the ball
13 of wax If you think that it's more likely than not
14 that Grady Carter's cancer was caused by some other
15 mysterious cause other than cigarette smoking when
16 there is no cause that anyone who has ever come
17 forward -- why didn't they come forward and identify
18 something else? Something to talk about. Never
19 have, never will. It's all smoke and mirrors. And
20 it's just a way to deceive you

21 So you say, Well, Wilner, didn't that
22 article say something about peripheral
23 adenocarcinoma? So put up 1152, and I'll explain
24 what the thing is with that one article as compared
25 to 57,000 other ones. It's always one little thing

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1 that somebody wants to pull out and not discuss
2 really with Dr. Feingold, but just -- thank you

3 All right. This is -- no, I'm sorry,
4 1153 I'm sorry This is the table out of that one
5 article that they are so happy about And what I
6 wanted to show you is this bronchiole alveolar,
7 which Mr Carter doesn't have, is 50 percent of the
8 never smokers in this group, which it doesn't amount
9 to much But, nevertheless, this is why this guy
10 goes off and says, it's peripheral adenocarcinoma,
11 which he includes this kind of cancer, which most
12 other people don't, although that's something that
13 people can debate We don't care We don't care.

14 That skews his statistic, because he says,
15 Well, that maybe we find in never smokers 50
16 percent -- not 50 percent of the cancers -- 50
17 percent of the never smokers had that cancer. There
18 were only 10 never smokers. There were 377 current
19 smokers and there were 103 ex-smokers.

20 So it's all because he lumps that in and
21 I'm -- I suggest to you that trying to make hay out
22 of this without some kind of an alternative
23 explanation, to deny the obvious is more of the same
24 garbage that we've heard for years, years out of
25 this industry and out of American Tobacco.

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1 How much time do I have?

2 So, also, all throughout this
3 presentation, little tidbits of remarks, little
4 bitty things some guy said Like Burney says, Well,
5 I don't know if we should warn the public How much
6 do you put that -- on that compared to your common
7 sense? And what was all the rest of the stuff he
8 said?

9 I mean, you know, people make flippant
10 remarks all the time. That's not the defense to a
11 case The defense to a case has to be with the law
12 and the evidence And what we are talking about,
13 I'll return to the central issue that the defense
14 has identified here, and that is whether they think
15 that Mr Carter -- or whether we -- their challenge
16 to provide that their bad product caused his
17 cancer.

18 All right. One second. Job of the
19 manufacturer is to provide the information. Oh, the
20 filter. Oh, I almost forgot, the filter. The
21 American Tobacco, Brown and Williamson wants to crow
22 that -- something about the Strickman filter. They
23 said, Yes, it was a failure, and that the internal
24 documents talked about it.

25 Well, the point is all thousand internal

1 documents were internal documents that were never
2 revealed. They mentioned other things, of course.
3 They mentioned filters of one kind. Maybe some of
4 those filters were published. Who knows? Who
5 cares? The point is they had a duty to work on and
6 fix their product. Their product was in bad shape.

7 Why was it in bad shape? It had two very,
8 very bad things that happened together. Either one
9 of which, if you took them out, would have made a
10 lot -- a big difference to Grady Carter and
11 everybody else. The reason the product was in such
12 bad shape was it had these monumental levels of
13 nicotine in it and monumental levels of carcinogens
14 including these powerful NNKs and NNNs and also the
15 polyaromatic hydrocarbons and everything else.

16 So it combined this -- an addictive level
17 of nicotine with a carcinogenic dose of everything
18 else. And nicotine was carcinogenic, too, because
19 that's where those nitrosamines came from. It's the
20 only thing around where you can get addicted to a
21 carcinogen.

22 You can be addicted to caffeine. The
23 caffeine defense that they play with says, Oh,
24 everything is addictive, so is caffeine. Well,
25 people aren't dying from that, so who cares? It's

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1 not a medical health problem. Who cares?

2 Also, they talked a lot about receptors.
3 And they said, caffeine has receptors. Caffeine
4 doesn't grow the receptors. Nicotine grows the
5 receptors. A brain change, quantitatively
6 different

7 Also, where does nicotine grow the
8 receptors? In that place in the brain, the
9 hippocampus responsible for decision making. It's a
10 bizarre thought, but the future is here

11 I mean, in a way, we are coming around the
12 back door. And is it true? Is it possible that
13 when you -- when one is under the influence of
14 nicotine, although you are not intoxicated that your
15 ability to decide about your next cigarette is
16 affected? I didn't say removed I said affected.
17 And I think that the answer is clearly yes, or else
18 very good people would not stand outside of
19 buildings at lunchtime and suck cigarettes. I mean,
20 they are not doing it because it's a pleasant thing
21 to do. I mean, how long will it take us to wake up
22 to this very common situation in this country, which
23 is not rational if you look at it

24 These people who are captains of industry,
25 physicians, doctors, air traffic controllers, good

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1 people, solid people You don't turn over the
2 control of airplanes to people who don't think
3 clearly

4 You know, this is a serious consequence
5 This is not a man who does not think clearly. Why
6 did he act like that? Just didn't want to? That
7 condemns the users That condemns the customers of
8 this great country who have been the guinea pigs.
9 They have been the mice They have undergone the
10 testing When the body count came back, it was
11 dreadful. It was terrible The cancer risk kept
12 going up The deaths kept piling up

13 And the cigarette companies in response to
14 that began back in 1954 committed to this constant,
15 this never ending denial, this unspeakable
16 advertising, these incredible, incredible
17 statements, which echoed throughout the media which
18 gave the people who were smoking their cigarettes in
19 response to their advertisements -- oh, he mentions
20 advertisements are not part of motivation. I got
21 that.

22 Well, then, there is a whole industry in
23 this country which is off base Why do we run
24 advertisements? Sure, everybody would like to think
25 advertisements don't affect me. Is that possible?

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1 I mean, if that were true, why the billions to
2 advertise? Why?

3 Well, we know, then, because they probably
4 affect in a way that maybe people aren't completely
5 aware of And couldn't it be that they really
6 affect the brain in a way, you know, that's roughly
7 analogous, maybe what we have been saying, they
8 don't intoxicate you. But they get in there somehow
9 and you remember And maybe you're not even aware
10 of it, but it happens And it's a fact of life.

11 And we believe in this great country that
12 we should be able to advertise We are not saying
13 don't But we're also saying that when you do, you
14 have an obligation to your customers to design your
15 product as safely as you possibly can. And there's
16 no evidence.

17 Where's the man, the woman from Brown and
18 Williamson up on that stand? I wanted to
19 cross-examine him. I wanted to say, What did you do
20 to your product? Tell me your test. Show me your
21 test. Show me your mouse-painting. Show me what
22 you think you could test your product. Show me how
23 many people died. If you don't like the
24 epidemiology, show me your test, show me your
25 seriousness, show me your commitment, show me your

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1 concern to your customers, show it. Tell me your
2 alternative designs, tell me what worked and what
3 didn't. Show me how you improved Lucky Strike.
4 Huh-uh You know why? Because people were buying
5 it Why should they bother to change?

6 People were willing to buy the product.
7 As long as they were willing to buy it, it wasn't
8 going to change. They let it sit out there. They
9 let that brand sit out there They let it sit out
10 there without change. They let it sit out there
11 long past the time that they knew that there was
12 something they can do

13 Even if they put something on it that was
14 not perfect, would it reduce the risks? Would it
15 begin to make a difference? Would it cut down?
16 Awful that they had to suggest that they could not
17 even bring anybody from this huge organization to
18 stand up to this cross-examination and say, yes, we
19 fixed it. Because they never fixed it.

20 So advertisements don't -- are not part of
21 motivation. I'm shocked. Everything works in to
22 what people do. Grady Carter is not being charged
23 with doing anything wrong. He's a very strong man,
24 but he lives in the world like everything else.

25 The intensity of the warning has to be

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1 commensurate with the risk. His honor will tell you
2 that The intensity of the warning. And
3 Mr Sheffler says, Well, the job of the manufacturer
4 is to provide information, which wasn't done. And
5 by the way, it wasn't our job to give an intense
6 warning. But, you know, if the dangers of
7 cigarettes -- what would be a warning commensurate
8 with the risk? I leave it to your imagination.

9 We've suggested some things And in the
10 hands of someone, either the person who received
11 directly everyday whenever they opened it or a loved
12 one or a doctor. Well, you know, who said anything
13 about doctors? What about if you go in and --
14 Mr Carter testified, you know, some doctors say
15 this, some doctors say that If every doctor had
16 before him the truth, not from Reader's Digest,
17 which you can disagree with, but from the
18 manufacturer, which said serious, bad.

19 And the same thing was seen by every user
20 all the time. Are we in the position to sit back
21 here and excuse American Tobacco, Brown and
22 Williamson for getting away, for ignoring their duty
23 just because they would like to blame their consumer
24 and swear that, Oh, my consumer, he wouldn't have
25 listened to the truth if I'd have told him? How do

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1 they reconcile this one or one of the terrible
2 problems in their own position? How can they say
3 with one hand -- yes, Your Honor?

4 THE COURT: I didn't say anything.

5 MR WILNER: I know I am on the last 30
6 seconds, I know.

7 How can they say -- how can they say this,
8 that Mr Carter, everybody else, should know about
9 how dangerous our product is, but poor little ole
10 us We did not. We don't think it's dangerous, but
11 everybody else is supposed to know it to the point
12 where even if we told it they wouldn't listen.

13 Now, you know that doesn't make sense
14 And the trouble is nothing -- nothing that is said
15 by the cigarette industry and American Tobacco and
16 Brown and Williamson has ever made a whole lot of
17 sense.

18 I'm at the end of my allotted time. If
19 there is something I didn't mention, it's not
20 because I really didn't want to tell you, because I
21 ran out of time. And I must leave you with the
22 remarks I have.

23 I will leave you with this one thing. The
24 Defendant Brown and Williamson did not address the
25 issue of compensation at all. They didn't even

1 bother to talk about it. I think that's very
2 typical of their attitude towards their consumers.
3 And I think the day that they get up and they say,
4 Okay, we've made some mistakes It's time to get
5 right, time to get going It's now time to -- it's
6 now time to go into the future It's time to get
7 into reality again It's been a bad -- it's been a
8 bad couple of years, you know, hurt a lot of people.

9 Well, that will be a great day. And maybe
10 we are one step. Thank you

11 THE COURT. Thank you, Mr. Wilner.

12 Lady and gentlemen, thank you for
13 listening closely to the arguments of the
14 attorneys I'll remind you that what they say, what
15 they have said is neither evidence nor the law. I
16 will instruct you on the law when you return from
17 your lunch break, which will be at 1:45. We'll
18 stand in recess until then.

19 I remind you that you are not to discuss
20 the case amongst yourselves nor permit anyone to
21 discuss the case in your presence.

22 We'll stand in recess until 1:45.

23 (Proceedings held in chambers at 12:50
24 p.m.)

25 (Present for this hearing in chambers are:

1 J W Prichard, Jr., Robert B Parrish, Steven
2 Vollins, Sean Cronin and Gregory Maxwell)

3 MR PRICHARD You asked for additional
4 copies?

5 THE COURT: Let me tell you, I did ask for
6 an additional copy of the instructions, the draft
7 instructions that you-all prepared and had a chance
8 to review The reason I asked for it is because I
9 tried to make a copy and the machine ate up some and
10 tore up others. So I didn't have the chance to
11 review them

12 I did make some decisions, however, that I
13 wanted to alert you of I'm going to use the
14 verdict form that does not have the total damage
15 line on it. I'll give it to you for your inspection
16 just to assure that in all other respects it
17 comports with my previous rulings concerning the
18 verdict form

19 (Discussion off record)

20 THE COURT: Do you have anything you need
21 to bring to my attention?

22 MR MAXWELL: No, Your Honor

23 THE COURT: With regard to the instruction
24 concerning a manufacturer's duty to fully test, I
25 have read the decisions that have been cited to me

1 and decided to strike the language, To uncover all
2 scientifically discoverable dangers, so that the
3 instruction will read, Moreover, a manufacturer
4 bears the duty to fully test its products before its
5 products are sold

6 MR VOLLINS Your Honor, can we get a
7 curative instruction on that since Mr. Wilner read
8 that instruction?

9 THE COURT: I have already given it. I've
10 already given the instruction at the end of
11 Mr Wilner's argument that reminded the jury that
12 what they had said was not evidence nor the law, and
13 that was at the request of defense counsel.

14 MR VOLLINS: I'm sorry

15 THE COURT: Now, the order is what I want
16 to talk about now My intention is to give, and if
17 you-all will follow along with me, the page
18 beginning, Members of the jury, that will be
19 Instruction No 1; consists of two pages And
20 Instruction No. 2 will be the page beginning, And
21 determining the believability of any witness; that
22 instruction consists of two pages Instruction
23 No. 3 will begin, You are instructed that The
24 American Tobacco Company merged, it's one page.

25 Instruction No. 4 will begin, Plaintiffs

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1 Grady and Mildred Carter have raised claims.
2 Instruction No. 5 will be, Plaintiffs Grady and
3 Mildred Carter do not raise claims; one page.
4 Instruction No. 6 will be, In this action,
5 Plaintiffs Grady and Mildred Carter are not
6 seeking. Instruction No. 7 begins, The issues for
7 your determination as to Brown and Williamson
8 Tobacco Corporation's statute of limitations
9 defense, and it consists of two pages

10 Instruction No 8 begins, In your
11 deliberations, you are to consider the two distinct
12 claims, that consists of two pages Instruction No.
13 9, The ultimate burden of persuasion in this case
14 submitted to the jury remains with the plaintiffs;
15 is one page Instruction No 10, The issue for your
16 determination on the negligence claims of Grady and
17 Mildred Carter, and that consists of one, two,
18 three, four pages.

19 Instruction No. 11, Negligence is a legal
20 cause of injury if it directly, consisting of one
21 page. Instruction No 12, In order to be regarded
22 as a legal cause of loss, injury or damage; and it
23 continues; it's one page. Instruction No. 13, A
24 manufacturer and supplier of a product who knows;
25 one page. Instruction No. 14, Since January 1st,

ACCURATE REPORTING SERVICE OF JACKSONVILLE, INC.

1 1996, consists of two pages

2 Instruction No 15, The issues for your
3 determination of the claim of Plaintiffs Grady and
4 Mildred Carter, and that consists of -- now that
5 instruction as -- that instruction as submitted
6 consists of four pages, is that right?

7 MR VOLLINS That's correct.

8 THE COURT This is where the order is
9 going to be modified slightly My intention is to
10 read the first page of what we now know as
11 Instruction 15, the second page and that portion of
12 the third page through what is the first complete
13 paragraph, which reads, A product is unreasonably
14 dangerous because of its design If the risk of
15 danger and design outweighs the benefits .. At that
16 point it is my intention to insert the instruction,
17 and I can't tell you what number it is, but several
18 of them -- because they are not numbered in the
19 drafts that you've given me now, but the instruction
20 that begins, To recover under plaintiffs' theory of
21 liability for design defect

22 MR. PARRISH: That will be 16?

23 THE COURT: Well, it really won't be 16.
24 It's going to be an insert into what is 15, so why
25 don't we call it 15-A.

1 MR. CRONIN: What does that start with
2 again, Your Honor?

3 THE COURT Where is it being inserted?

4 MR. CRONIN No, Your Honor. How does
5 that one start?

6 THE COURT: To recover under plaintiffs'
7 theory of liability for design defect, you must
8 determine one Let's call that one 15-A since
9 it's being inserted That consists of one page.

10 MR PARRISH And ends with company?

11 THE COURT. Correct 15-B, which will
12 also be inserted and follow 15-A begins, For
13 Plaintiffs Grady and Mildred Carter to recover under
14 their design defect theory It's going to be 15-B.
15 That ends, injuries would have been avoided; that
16 consists of one page 15-C, which will also be
17 inserted at this point reads, In determining whether
18 the cost of the alternative design was outweighed by
19 the danger posed, and that consists of two pages.
20 That will be inserted at that point.

21 15-D is, A manufacturer has a duty to
22 possess expert knowledge in the field of its
23 products; and it will be inserted at that point.
24 And 15-E reads, Moreover, a manufacturer bears a
25 duty to fully test -- excuse me -- test its products

1 before its products are sold That will be inserted
2 at that point.

3 The instructions will then continue in
4 what we have identified as Instruction No. 15 with
5 the sentence, In evaluating the reasonableness of
6 the conduct of the defendant at any relevant time,
7 you must consider the knowledge of the medical and
8 scientific community at that time. And then it will
9 continue as printed through the second page of --
10 actually it's the fourth page of the original No. 15
11 and end with, Greater weight of the evidence means
12 the more persuasive and convincing force and affect
13 on the entire evidence in the case.

14 I then intend to give -- we'll call this
15 16, A defect in a product is a legal cause of injury
16 if it directly and in natural and continuous
17 sequence. And Instruction No. 17, in order to be
18 regarded as a legal cause of loss, injury or damage;
19 consists of one page That will be 17 And 18 will
20 be, If your verdict is for the defendant, you will
21 not consider the matter of damages; that consists of
22 three pages No. 19, if the greater weight of the
23 evidence shows that Grady Carter has been
24 permanently injured; consisting of one page.

25 Instruction No. 20 will be, Your verdict

1 must be based on the evidence; one page.
2 Instruction No. 21 will be, During the course of the
3 trial, you have taken notes -- you may have taken
4 notes, that's one page. And then Instruction 22
5 will be, When you retire to the jury room.

6 Now, does the verdict form contain five
7 questions?

8 MR MAXWELL Yes, Your Honor.

9 MR PRICHARD Here is your original
10 back. You tendered it for our inspection.

11 THE COURT Okay Now, with that
12 explanation of what I intend to do, other than
13 objections that have been previously stated, are
14 there any objections to my proposed reading of the
15 jury instructions?

16 MR PARRISH It's not an objection, just
17 what I think is a typo on instruction No. 8, Your
18 Honor

19 THE COURT: Let me get that. All right.

20 MR PARRISH: I think it's the first line
21 after the word "consider," the word "the," t-h-e,
22 should be deleted.

23 THE COURT: You are to consider two
24 distinct -- in your deliberations, you are to
25 consider two distinct claims. Okay.

1 Objection to that by the plaintiff?

2 MR MAXWELL No objection, Your Honor.

3 THE COURT For the plaintiff, any
4 objections to the proposed order or instructions
5 that have not been previously stated?

6 MR MAXWELL No, Your Honor. I'm looking
7 at our Instruction No. 6. I just wanted to think
8 about this for a second Something troubling about
9 this, and I can't quite put my finger on it. I
10 think what troubles me is that we are seeking
11 damages, of course, for his injury of lung cancer
12 and addiction I'm a little concerned that this
13 instruction might tend to be just a little
14 confusing, in that it's not seeking damages after
15 '72 when the damages did, in fact, occur
16 after '72

17 I'm thinking perhaps I could suggest a pen
18 change to read, In this action, Plaintiffs Grady and
19 Mildred Carter are not seeking damages based upon
20 Grady Carter's smoking other cigarettes after 1972.

21 MR. VOLLINS: I think the "other" would
22 make it a little confusing. It says, Grady Carter
23 smoking cigarettes after 1972. You are not seeking
24 damages for that. It doesn't say you are not
25 seeking damages for other things.

1 MR. MAXWELL Does the court understand
2 the problem that I'm wrestling with?

3 THE COURT Yes, sir, I do.

4 MR MAXWELL I would just seek that pen
5 change to the instruction, seeking damages based
6 upon Grady Carter smoking other cigarettes.

7 MR. VOLLINS I don't mind the "based
8 upon," but the "other cigarettes," I think, is going
9 to create a lot of confusion.

10 MR. MAXWELL Well, the evidence has been
11 that he smoked other cigarettes after 1972. I just
12 want to -- I don't want to leave the impression with
13 the jury that he's not seeking damages for his
14 injuries that occurred much later beyond that date.

15 MR PRICHARD If they believe that you're
16 not suing -- you said 50 times that Lucky Strike
17 cigarettes caused his lung cancer. I mean, that's
18 what the evidence is I agree with you -- I
19 understand your concern, but I think it's ephemeral,
20 Greg, because they have been told so clearly what
21 your claim is.

22 MR. MAXWELL I would request that pen
23 change to that instruction

24 THE COURT What confusion does it add,
25 Mr Vollins?

1 MR. VOLLINS The other cigarettes, I'm
2 not quite sure whether it's clear from the previous
3 instruction what those other cigarettes would be.

4 THE COURT It's clear he didn't smoke
5 Lucky Strike after 1972 I don't think that they
6 would ever be confused about that

7 MR. MAXWELL: Based upon Grady Carter
8 smoking other cigarettes after 1972.

9 MR. VOLLINS I think the "other" may even
10 imply, though, that he may have smoked Lucky Strikes
11 after '72

12 MR. PARRISH Not trying to double-team
13 you, but I don't understand that sentence. I think
14 you've got something dangling in there or missing or
15 something The syntax with that "other" in there.

16 MR. VOLLINS The "other" doesn't follow.

17 MR. PARRISH It doesn't flow to me

18 MR. VOLLINS The previous instruction
19 doesn't talk about Lucky Strike cigarettes. And all
20 of a sudden you are talking about other cigarettes
21 in Instruction No 6. It's very unclear, and it
22 gives the inference that Grady Carter did smoke
23 Luckies after '72

24 MR. MAXWELL: All right, well, let's say,
25 Smoking other brands of cigarettes

1 MR. PRICHARD: Same situation.

2 THE COURT: I think I'm going to leave it,
3 unless you want to withdraw it completely.

4 MR. MAXWELL: Well, I would. I would
5 request that this be withdrawn completely. This was
6 not one of the ones that we requested.

7 MR. PARRISH: We argued this yesterday

8 THE COURT: It's from the stipulation?

9 MR. MAXWELL: It's from the stipulation,
10 Your Honor, but the stipulation was not read to the
11 jury

12 MR. VOLLINS: Which is why it should be
13 read

14 MR. PRICHARD: Part of the stipulation was
15 that it be read to the jury.

16 THE COURT: You-all didn't tell me that.

17 MR. MAXWELL: But we didn't read it and
18 they didn't read it.

19 MR. PARRISH: This was argued yesterday.

20 THE COURT: I don't think it's confusing,
21 Mr. Maxwell. I'm going to leave it in as it is. So
22 that motion will be denied.

23 All right. Thank you all very much. I'll
24 see you then at a quarter till

25 (Change of reporters at 1:15 p m.)

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

CASE NO. . 95-00934-CA

DIVISION CV-B

GRADY CARTER and
MILDRED CARTER,

Plaintiffs,

vs.

BROWN & WILLIAMSON TOBACCO
CORPORATION, as successor by
merger to THE AMERICAN TOBACCO
COMPANY,

Defendant.

TESTIMONY AND PROCEEDINGS

August 8, 1996

(Afternoon Session)

VOLUME XIV
Pages 4123 - 4169

ACCURATE REPORTING SERVICE OF JACKSONVILLE, INC.
501 West Bay Street, Suite 150
Jacksonville, FL 32202 (904-355-8416)

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P R O C E E D I N G S

August 8, 1996

1:50 p.m.

(Jury absent)

THE BAILIFF All rise This court is
again in session Be seated, please.

THE COURT Let me see counsel at side bar
for just a minute I don't need the court
reporter.

(Side Bar, Court and counsel)

THE COURT Mr. Hyatt, do you have the
jury list? I don't have mine with me.

THE CLERK Yes

THE COURT Mr Maxwell, anything else to
take up with the Court before the jury is charged?

MR. MAXWELL: Nothing, Your Honor.

THE COURT Mr Prichard?

MR. PRICHARD Nothing, Your Honor.

THE COURT Very good.

Mr. Forte, bring the jury in, please.

(Jury present)

THE COURT: Please be seated.

Members of the jury, I shall now instruct
you on the law that you must follow in reaching your
verdict. It is your duty as jurors to decide the
issues, and only those issues, that I submit for

1 determination by your verdict In reaching your
2 verdict, you should consider and weigh the evidence,
3 decide the disputed issues of fact, and apply the
4 law on which I shall instruct you, to facts as you
5 find them from the evidence

6 The evidence in this case consists of the
7 sworn testimony of the witnesses, all exhibits
8 received in evidence, and all facts that may be
9 admitted or agreed to by the parties.

10 In determining the facts, you may draw
11 reasonable inferences from the evidence You may
12 make deductions and reach conclusions which reason
13 and common sense lead you to draw from the facts
14 shown by the evidence in this case. But you should
15 not speculate on any matters outside the evidence.

16 In determining the believability of any
17 witness and the weight to be given the testimony of
18 any witness, you may properly consider the demeanor
19 of the witness while testifying, the frankness or
20 lack of frankness of the witness, the intelligence
21 of the witness, any interest the witness may have in
22 the outcome of the case, the means and opportunity
23 the witness had to know the facts about which the
24 witness testified, the ability of the witness to
25 remember the matters about which the witness

1 testified, and the reasonableness of the testimony
2 of the witness, considered in light of all the
3 evidence in the case and in the light of your own
4 experience and common sense.

5 You have heard opinion testimony from
6 persons referred to as expert witnesses.

7 You may accept such opinion testimony,
8 reject it, or give it the weight you think it
9 deserves, considering the knowledge, skill,
10 experience, training, or education of the witness,
11 the reasons given by the witness for the opinion
12 expressed, and all other evidence in the case.

13 You are instructed that The American
14 Tobacco Company merged with the defendant Brown &
15 Williamson Tobacco Corporation and that, as a result
16 of the merger, Brown & Williamson Tobacco
17 Corporation has succeeded to the liabilities of The
18 American Tobacco Company.

19 Plaintiffs Grady and Mildred Carter have
20 raised claims against Brown & Williamson Tobacco
21 Corporation, as successor by merger to The American
22 Tobacco Company, based on the injuries Mr. Carter
23 allegedly sustained as a result of smoking Lucky
24 Strike cigarettes, which were manufactured by The
25 American Tobacco Company. It is alleged that Grady

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1 Carter smoked Lucky Strike cigarettes from 1947
2 through 1972 and other brands of cigarettes from
3 1972 to 1991

4 Plaintiffs Grady and Mildred Carter do not
5 raise claims based on the conduct of Brown &
6 Williamson Tobacco Corporation Their claims are
7 based solely on the conduct of The American Tobacco
8 Company, prior to the time it merged with the Brown
9 & Williamson Tobacco Corporation in 1995.

10 In this action, plaintiffs Grady and
11 Mildred Carter are not seeking damages for Grady
12 Carter's smoking cigarettes after 1972.

13 The issues for your determination as to
14 Brown & Williamson Tobacco Corporation's statute of
15 limitations defense are whether the plaintiff filed
16 their action within four years from the time the
17 facts giving rise to the cause of action were
18 discovered or should have been discovered with the
19 exercise of due diligence. In determining this
20 issue, you should consider, one, whether plaintiff
21 Grady Carter had both knowledge of the actual
22 injury and knowledge that there was a reasonable
23 possibility that the injury was caused by
24 defendant; and, two, whether Grady Carter brought
25 the instant action within four years of that time.

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1 If the greater weight of the evidence supports
2 defendant Brown & Williamson Tobacco Corporation,
3 then your decision on this issue should be for
4 defendant Brown & Williamson Tobacco Corporation;
5 however, if the greater weight of the evidence does
6 not support the position of Brown & Williamson
7 Tobacco Corporation, then your decision on the issue
8 should be in favor of claimant Grady Carter.

9 In your deliberations you are to consider
10 two distinct claims. Plaintiffs Grady Carter and
11 Mildred Carter allege, first, that defendant was
12 negligent in failing to warn Grady Carter of the
13 known or knowable dangers associated with smoking
14 Lucky Strike cigarettes and that such negligence was
15 a legal cause of loss, injury or damage sustained by
16 claimants Grady and Mildred Carter. Second,
17 plaintiffs Grady and Mildred Carter also allege that
18 Lucky Strike cigarettes, manufactured and sold by
19 The American Tobacco Company, were defective when
20 they left possession of The American Tobacco Company
21 and that such defect was a legal cause of loss,
22 injury or damage sustained by claimants Grady and
23 Mildred Carter. Although these claims have been
24 tried together, each is separate from the other, and
25 each party is entitled to have you separately

ACCURATE REPORTING SERVICE OF JACKSONVILLE, INC.

1 consider each claim as it affects that party.
2 Therefore, in your deliberations, you should
3 consider the evidence as it relates to each claim
4 separately, as you would had each claim been tried
5 before you separately

6 The ultimate burden of persuasion in this
7 case submitted to the jury remains with the
8 plaintiffs

9 The issues for your determination on the
10 negligence claim of Grady and Mildred Carter against
11 defendant are

12 Whether defendant was negligent in failing
13 to warn Grady Carter of the known or knowable
14 dangers associated with smoking Lucky Strike
15 cigarettes and, if so, whether such negligence was a
16 legal cause of loss, injury or damage sustained by
17 claimants Grady and Mildred Carter.

18 A product is defective if it is
19 unreasonably dangerous and placed in the hands of a
20 consumer without a warning. This does not mean that
21 to prevent a product from being deemed unreasonably
22 dangerous a warning must always be given. There is
23 a duty to warn only when the hazards associated with
24 the use of the product are not obvious, not
25 reasonably apparent, or not as well known to the

1 user as the manufacturer.

2 A duty to warn attaches, not when
3 scientific certainty is established, but whenever a
4 reasonable man would want to be informed of the risk
5 in order to decide whether to expose himself to it.

6 In evaluating whether a manufacturer has a
7 duty to warn at any relevant time, you must consider
8 the knowledge of the medical and scientific
9 community at the time

10 Negligence is the failure to use
11 reasonable care. Reasonable care is that degree of
12 care which a reasonably careful person would use
13 under like circumstances. Negligence may consist
14 either in doing something that a reasonably careful
15 person would do or not doing or failing to do
16 something that a reasonably careful person would do
17 under like circumstances.

18 If the greater weight of the evidence does
19 not support the negligence claim of Grady and
20 Mildred Carter, then your verdict on the negligence
21 claim should be for the defendant.

22 If, however, the greater weight of the
23 evidence does support the negligence claim of
24 plaintiffs Grady and Mildred Carter, then your
25 verdict should be for plaintiffs in the total amount

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1 of their damages

2 Greater weight of the evidence means the
3 more persuasive and convincing force and effect of
4 the entire evidence in the case

5 Negligence is a legal cause of injury if
6 it directly and in natural and continuous sequence
7 produces or contributes substantially to producing
8 such injury, so that it can be reasonably said that,
9 but for the negligence, the injury would not have
10 occurred.

11 In order to be regarded as a legal cause
12 of loss, injury or damage, negligence need not be
13 the only cause. Negligence may be a legal cause of
14 loss, injury or damage even though it operates in
15 combination with the act of another or some other
16 cause if such other cause at the same time as the
17 negligence -- excuse me -- if such other cause
18 occurs at the same time as the negligence and if the
19 negligence contributes substantially to producing
20 such loss, injury or damage.

21 A manufacturer and supplier of a product
22 who knows or has reason to know that the product is
23 likely to be dangerous in normal use has a duty to
24 warn those who may not fully appreciate the
25 possibility of such danger. The warning should be

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1 of such intensity as to cause a reasonable man to
2 exercise for his own safety caution commensurate
3 with the potential danger.

4 Since January 1, 1996, federal law has
5 required specific warnings to appear on packages of
6 cigarettes sold in the United States. There is no
7 claim in this case that The American Tobacco
8 Company's cigarettes were not labeled in accordance
9 with this statute

10 The federal law does not limit the
11 liability of defendant against the claim of a
12 failure to warn before July 1, 1969. However,
13 you're not to base any finding of liability on a
14 determination that after July 1, 1969, the defendant
15 should have included additional or more clearly
16 stated warnings in the advertising or promotion of
17 its cigarettes or that the defendant, through its
18 advertising or promotional practices, neutralized,
19 minimized, or undermined the effect of the federally
20 mandated warnings during that time.

21 The federal law does not limit the
22 liability of the defendant against claims that its
23 products were defective and unreasonably dangerous
24 in their design.

25 The issues for your determination on the

ACCURATE REPORTING SERVICE OF JACKSONVILLE, INC.

1 claim of plaintiffs Grady and Mildred Carter against
2 defendant are whether the Lucky Strike cigarettes
3 manufactured and sold by The American Tobacco
4 Company were defective when they left the possession
5 of the American Tobacco Company and, if so, whether
6 such defect was a legal cause of loss, injury or
7 damage sustained by plaintiffs Grady and Mildred
8 Carter.

9 A product is defective if by reason of its
10 design the product is in a condition unreasonably
11 dangerous to the user of the product and the product
12 is expected to and does reach the users without
13 substantial change affecting the condition. A
14 product is unreasonably dangerous if it is dangerous
15 to an extent beyond that which would be contemplated
16 by the ordinary consumer who purchases it with the
17 ordinary knowledge common to the community as to its
18 characteristics.

19 A product is defective if it is
20 unreasonably dangerous and placed in the hands of a
21 consumer without a warning. This does not mean that
22 to prevent a product from being deemed unreasonably
23 dangerous a warning must always be given There is
24 a duty to warn only when the hazards associated with
25 the use of the product are not obvious, not

1 reasonably apparent, or not as well known to the
2 user as the manufacturer.

3 A product is unreasonably dangerous
4 because of its design if the risk of danger in the
5 design outweighs the benefits.

6 To recover under plaintiffs' theory of
7 liability for design defect, you must determine,
8 one, whether the alleged injuries plaintiff Grady
9 Carter sustained as a result of the challenged
10 design for Lucky Strike cigarettes would have been
11 avoided, or less severe, had The American Tobacco
12 Company used a feasible alternative and available
13 design, and whether the enhanced danger posed by the
14 challenged design outweighed the added cost, if any,
15 to The American Tobacco Company

16 For plaintiffs Grady and Mildred Carter to
17 recover under their design defect theory, you must
18 also determine whether plaintiff Grady Carter would
19 have used the product employing the alternative
20 design instead of the Lucky Strike cigarettes that
21 he did smoke, and that if he had used a product with
22 this alternative design, his injuries would have
23 been avoided.

24 In determining whether the cost of the
25 alternative design was outweighed by the danger

1 posed by the design actually used by The American
2 Tobacco Company in manufacturing the Lucky Strike
3 cigarettes, you must consider the following
4 factors Number one, the usefulness and
5 desirability of the product, number two, the
6 availability of other and safer products to meet the
7 same need, number three, the likelihood of injury
8 and its probable seriousness, number four, the
9 obviousness of the danger; number five, common
10 knowledge and normal public expectation of the
11 danger, particularly for established products;
12 number six, the avoidability of injury by care in
13 use of the product, including the effect of
14 instructions or warnings, and, number seven, the
15 ability to eliminate the danger without seriously
16 impairing the usefulness of the product or making it
17 unduly expensive.

18 A manufacturer has the duty to possess
19 expert knowledge in the field of its products.

20 Moreover, a manufacturer bears the duty to
21 fully test its products before its products are
22 sold.

23 In evaluating the reasonableness of the
24 conduct of defendant at any relevant time, you must
25 consider the knowledge of the medical and scientific

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1 community at the time

2 If the greater weight of the evidence does
3 not support the claim of Grady Carter, your verdict
4 should be for the defendant.

5 However, if the greater weight of the
6 evidence does support the claim of claimants Grady
7 and Mildred Carter, then your verdict should be for
8 claimants Grady and Mildred Carter and against the
9 defendant.

10 Greater weight of the evidence means the
11 more persuasive and convincing force and effect of
12 the entire evidence in the case.

13 A defect in a product is a legal cause of
14 injury if it directly and in natural and continuous
15 sequence produces or contributes substantially to
16 producing such injury, so that it can be said -- so
17 that it can reasonably be said, but for the defect,
18 the injury would not have occurred

19 In order to be regarded as a legal cause
20 of loss, injury or damage, the defect need not be
21 the only cause. A defect may be a legal cause of
22 loss, injury or damage even though it operates in
23 combination with the act of another or some other
24 cause if such other cause occurs at the same time
25 the defect had its effect and if the defect

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1 contributes substantially to producing such loss,
2 injury or damage.

3 If your verdict is for the defendant, you
4 will not consider the matter of damages. But if you
5 find for plaintiffs Grady and Mildred Carter, you
6 should award Grady and Mildred Carter an amount of
7 money that the greater weight of the evidence shows
8 will fairly and adequately compensate them for such
9 damage, loss or injury which they sustained as a
10 result of the actions of the defendant, including
11 any such damage as Grady and Mildred Carter are
12 reasonably certain to experience in the future
13 You should consider the following elements:

14 Any bodily injury sustained by Grady
15 Carter and any resulting pain and suffering,
16 disability or physical impairments, disfigurement,
17 mental anguish, inconvenience, loss of capacity for
18 the enjoyment of life experienced in the past or to
19 be experienced in the future. There is no exact
20 standard for measuring such damage. The amount
21 should be fair and just in the light of the
22 evidence.

23 Any loss by Mildred Carter of the
24 services, comfort, society and attentions of Grady
25 Carter, in the past and in the future, by reason of

1 her husband's injury. There is no exact standard
2 for measuring such damage The amount should be
3 fair and just in light of the evidence.

4 If the greater weight of the evidence
5 shows that Grady Carter had been permanently
6 injured, you may consider his life expectancy. The
7 mortality tables received in evidence may be
8 considered in determining how long Grady Carter may
9 be expected to live Such tables are not binding on
10 you but may be considered together with other
11 evidence in the case bearing on Grady Carter's
12 health, age and physical condition, before and after
13 the injury, in determining the probable length of
14 his life.

15 Your verdict must be based on the evidence
16 that has been received and the law on which I have
17 instructed you. In reaching your verdict, you are
18 not to be swayed from the performance of your duty
19 due to prejudice, sympathy or any other sentiment
20 for or against any party.

21 During the course of the trial, you may
22 have taken notes with regard to the evidence
23 presented While you may refer to your notes, your
24 notes are not to be considered as evidence in the
25 case, and no one juror's notes should be given any

1 greater weight than the notes of any other juror

2 When you retire to the jury room, you
3 should select one of your member to act as a foreman
4 or forewoman to preside over your deliberations and
5 sign your verdict Your verdict must be unanimous,
6 that is, your verdict must be agreed by each of you.

7 You will be given a verdict form with five
8 questions, which I shall now read to you.

9 It bears the style of the case with the
10 parties' names and reads as follows We, the jury,
11 return the following verdict

12 Number one. Was there negligence on the
13 part of defendant Brown & Williamson Tobacco
14 Corporation, as successor by merger to The American
15 Tobacco Company, which was a legal cause of loss,
16 injury or damage to plaintiffs Grady Carter and
17 Mildred Carter?

18 There is a blank appearing on the form for
19 your answer to that question, either yes or no.

20 Number two: Were the Lucky Strike
21 cigarettes manufactured by defendant Brown &
22 Williamson Tobacco Corporation, as successor by
23 merger to The American Tobacco Company, unreasonably
24 dangerous and defective and a legal cause of loss,
25 injury or damage to plaintiffs Grady and Mildred

ACCURATE REPORTING SERVICE OF JACKSONVILLE, INC.

1 Carter?

2 Likewise, there are blanks for your
3 consideration based on your finding, either yes or
4 no

5 There is after that an explanatory
6 paragraph.

7 And item three. Is the plaintiffs' cause
8 of action barred by the four-year statute of
9 limitations?

10 As with the other questions, there are two
11 blanks for your consideration, one yes, one no,
12 depending upon your finding, followed by an
13 explanatory paragraph and another question.

14 Number four What is the amount of
15 damages sustained by plaintiff Grady Carter for pain
16 and suffering, mental anguish and loss of capacity
17 for the enjoyment of life?

18 There are two blanks for you to place
19 amounts, if that is your finding, one for past
20 damages and one for future damages, followed by the
21 last question.

22 Number five: What is the amount of
23 damages sustained by plaintiff Mildred Carter for
24 mental anguish, loss of her husband's services,
25 comfort, society and attentions?

ACCURATE REPORTING SERVICE OF JACKSONVILLE, INC.

1 And as with question four, a blank for
2 past and future damages, a place for the form to be
3 dated and signed by your foreman or forewoman

4 When you have agreed on your verdict, the
5 foreman or forewoman, acting for the jury, should
6 date and sign the appropriate verdict form.

7 With the exception of Mr. Carter and
8 Mr Smith -- before I do that, let me see counsel at
9 side bar, please

10 (Side-bar conference held outside the
11 hearing of the jury)

12 THE COURT: Are there objections to the
13 Court's reading of the instructions?

14 MR PRICHARD There is, Your Honor I
15 would request the Court reread instruction No. 14.
16 Unfortunately, when you began to read it, you said
17 January 1, 1996, instead of '66, and that might
18 cause some confusion

19 THE COURT: That's true.

20 MR. PRICHARD: I didn't want to interrupt
21 you at the time obviously

22 But other than that, Your Honor, other
23 than No 14 which we request be reread, as read, we
24 have no objections.

25 THE COURT: All right.

1 MR. WILNER: Your Honor, if you reread it,
2 I would just ask that you mention that you're
3 rereading it because --

4 THE COURT: Because I screwed up

5 MR. WILNER: Not because it's more
6 important I think that's --

7 THE COURT I understand I'll do that

8 (Side-bar conference concluded;
9 proceedings resumed before the jury)

10 THE COURT Lady and gentlemen, I'm glad I
11 decided to check with counsel with regard to my
12 reading of the instructions I made an error and I
13 need to correct it.

14 My correction is based on my having made
15 the error and not on this instruction being more
16 important in any sense It's simply to correct the
17 error, that I will reread the entire instruction.

18 My error was that I said since January 1,
19 1996, federal law has required specific warnings. I
20 should have read as follows.

21 Since January 1, 1966, federal law has
22 required specific warnings to appear on packages of
23 cigarettes sold in the United States. There is no
24 claim in the case that The American Tobacco
25 Company's cigarettes were not labeled in accordance

1 with this statute

2 The federal law does not limit the
3 liability of defendant against the claim of a
4 failure to warn before July 1, 1969 However, you
5 may not base any finding of liability on a
6 determination that after July 1, 1969, the defendant
7 should have included additional or more clearly
8 stated warnings in the advertising or promotion of
9 its cigarettes or that the defendant, through its
10 advertising or promotional practices, neutralized,
11 minimized, or undermined the effect of the federally
12 mandated warnings during that time.

13 The federal law does not limit the
14 liability of the defendant against claims that its
15 products were defective and unreasonably dangerous
16 in their design.

17 Anything else for the defendant?

18 MR. PRICHARD No, Your Honor.

19 THE COURT: For the plaintiff?

20 MR. MAXWELL No, Your Honor.

21 With the exception of Mr Carter and
22 Mr. Smith -- I need to take up some matters with
23 both of them -- the balance of the jurors may retire
24 to the jury room to consider their verdict. The
25 bailiff will bring to you the items that have been

1 offered into evidence.

2 (Jury retires to deliberate at 2:19 p m.)

3 (Discussion off record)

4 THE COURT: Please be seated

5 Why don't you have a seat, if you don't
6 mind. Mr. Carter, Mr Smith, if you just have a
7 seat, I'll be with you in just a moment.

8 Mr Prichard, did you have something you
9 needed to take up with the Court?

10 MR PRICHARD No, Your Honor I'm just
11 carrying this over here for Mr. Hyatt

12 THE COURT All right.

13 THE BAILIFF: Your Honor, they're
14 wondering if they could get a drink before they
15 start their deliberations

16 THE COURT. Tell them I'll give them a
17 break in just a moment.

18 Mr. Carter, Mr. Smith, as you can imagine,
19 I've had some difficult tasks during the course of
20 the past two-and-a-half weeks, but none quite as
21 difficult as the news I'm about to share with you.
22 This is that you were selected as alternate jurors
23 in this case. And because we have closed the case,
24 having the evidence, the arguments, and we heard
25 them all without there being a need to have an

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1 alternate actually deliberate because none of our
2 six jurors, as required by law, became ill or had
3 emergencies, your services are no further needed.

4 Oftentimes alternate jurors feel cheated
5 because they, as I know you did in this case, paid
6 close attention to the evidence and considered and
7 weighed it in your minds I appreciate, the parties
8 appreciate, the system appreciates the time that you
9 have devoted and the attention that you've given to
10 the case

11 Without your service we could not have
12 proceeded because in the event there was an
13 emergency, we would have needed you and we would not
14 have been able to go forward without you
15 Fortunately for all of us, there was not an
16 emergency. And on behalf of all of us, I want to
17 express our sincere appreciation

18 I also want to tell you of some rights and
19 privileges that you will enjoy as jurors. No juror
20 can ever be required to talk about the discussions
21 or the evidence that has been received in the
22 courtroom if they choose not to For many centuries
23 our society has relied upon juries for consideration
24 of difficult cases.

25 We've recognized that for hundreds of

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1 years the jury's role should remain private as long
2 as they wish it to be that way. Therefore, the law
3 gives you a unique privilege not to speak with
4 anyone about your work as an alternate juror
5 Although you are at liberty to speak with anyone
6 about your service as you choose, you are likewise
7 at liberty to refuse to speak to anyone if you so
8 choose.

9 A request may come to you from those who
10 are simply curious or from those who might want to
11 find fault with your service It is up to you to
12 decide whether you preserve your right to privacy as
13 a juror

14 With that -- you're free to remain if you
15 so choose for purposes of awaiting the jury's
16 verdict But if you do not wish to remain, you
17 certainly are free to go Thank you again.

18 ALTERNATE JUROR: It will be on TV, right,
19 the verdict?

20 THE COURT: It will be on TV also, as will
21 you now that you're walking before that camera.

22 (Alternate jurors left the courtroom)

23 THE COURT: All right. Is there anything
24 else to take up with the court at this time?

25 MR. MAXWELL: Nothing for the plaintiff,

1 Your Honor.

2 MR PRICHARD: Nothing, Your Honor

3 THE COURT Then we will await the jury's
4 verdict. We'll stand in recess until then.

5 THE BAILIFF All rise This court is in
6 recess until notification by the jury

7 (Discussion off record and recess)

8 THE COURT I need to be on the record
9 again for just a minute That's probably the
10 shortest recess in history. Can I have your
11 attention for just a moment

12 Gentlemen, the jurors wanted to take a
13 break Apparently you may have overheard they
14 wanted to get a drink, as I understand. My intention
15 is to allow them to do that for five minutes or so
16 and to then have them return collectively to the
17 courtroom unless you have some objection.

18 MR. MAXWELL: No objection, Your Honor.

19 THE COURT: Mr. Maxwell -- I mean,
20 Mr Prichard?

21 MR. PRICHARD: I guess not, Your Honor.

22 THE COURT: Mr Forte, if you would, get
23 them and -- what, they want water and a bathroom
24 break?

25 THE BAILIFF: Well, they've got a bathroom

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1 and cold water in there. I assume they want cola,
2 sir, or coffee.

3 THE COURT: Why don't you --

4 THE BAILIFF: I'll take them in a group

5 THE COURT: -- escort them -- I need you
6 to remain on the record

7 Those that wish to get drinks, if you
8 would escort them collectively to the location for
9 them to get them, stay with them while they're
10 there, and then bring them back. I would appreciate
11 it

12 THE BAILIFF Yes, Your Honor

13 THE COURT: Make sure that they don't have
14 any contact with anyone

15 THE BAILIFF. Yes, sir.

16 (Discussion off record)

17 THE BAILIFF: They've corrected their
18 request, Your Honor. They said maybe later They
19 said they don't want it now.

20 THE COURT: They changed their mind?

21 THE BAILIFF: Yes, sir

22 (Discussion off record)

23 THE COURT: We'll stand in recess.

24 (Recess at 2:28 p.m.)

25 (Change of reporters)

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P R O C E E D I N G S

Thursday, August 8, 1996

3:24 p.m.

- - -

(Jury in deliberations)

THE BAILIFF All rise. This court is
again in session. Be seated, please

Your Honor, apparently the plaintiff
walked out or something But I can go search him
down.

THE COURT: Okay

THE BAILIFF Best I can learn, Your
Honor, they have stepped back over to their office,
and this gentleman is calling them on the phone

THE COURT: All right. Thank you
(Discussion off record)

THE BAILIFF. They were contacted, Your
Honor They should be here momentarily.

THE COURT: All right. Thank you,
Mr. Forte

THE BAILIFF. Should I check more
closely? There were so many people here I just
thought they were among the group.

THE BAILIFF. (Telephone call placed) They
have left over there.

(Plaintiffs and Mr Wilner returned to the

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1 courtroom at 3.36 p.m.)

2 THE COURT: Okay. We're back on the
3 record

4 I understand that despite our -- or my
5 instruction to the jury to place their questions in
6 writing that Mr Forte was summoned to the jury room
7 by the buzzer And when he walked into the room,
8 the question was put to him Where are the
9 depositions?

10 He reported that to me I'm reporting
11 that to you-all We can do one of two things. We
12 can either answer that question for them or we can
13 request that they put their question in writing, as
14 they were previously instructed, and then we can
15 address it

16 Do you have a pleasure?

17 MR PRICHARD: Your Honor, I think for
18 completeness it would probably be best to ask them
19 to put the question in writing. It may be the only
20 question they have. And I assume it will be
21 addressed at that time

22 THE COURT: All right. Mr. Wilner?

23 MR. WILNER: We don't care.

24 THE COURT: All right. Ask them to put
25 the question in writing, please, Mr. Forte, and send

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1 it out to you

2 THE BAILIFF All right

3 THE COURT Mr Prichard and Mr Maxwell,
4 let me see you at side bar for just a minute,
5 please

6 (Side bar, Court and counsel)

7 THE BAILIFF (Hands document to the
8 Court)

9 THE COURT Thank you, sir. It's not a
10 question, after all It is a declaration. It
11 reads: "We, the jury, would like to review the
12 depositions which were read into evidence."

13 I'll hear from counsel on both sides on
14 how to respond

15 MR. PRICHARD Your Honor, I would think
16 that the standard response is to rely on your best
17 recollections as to the testimony that was read in,
18 is the appropriate response at this point.

19 MR. MAXWELL I concur, Your Honor.

20 THE COURT: All right. Shall we put that
21 response to them in writing or shall I bring them
22 out and verbally instruct them to that effect?

23 MR. MAXWELL I think putting it in
24 writing would be acceptable for the plaintiff.

25 MR. PRICHARD For this short a question,

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1 Your Honor, I think that's probably easier, don't
2 you?

3 THE COURT. Well, try this on for size,
4 gentlemen: The depositions are not available to
5 you. You are to rely on your collective
6 recollections.

7 MR. MAXWELL. No objection from plaintiff,
8 Your Honor.

9 MR. PRICHARD. That's fine, Your Honor.

10 THE COURT. "Judge Brian Davis" (marks
11 document) Probably need to mark this as a court
12 exhibit for identification

13 (The Court's Exhibit No 1 was marked for
14 identification.)

15 THE COURT. Mr. Forte, if you would
16 deliver that to the jury, please.

17 THE BAILIFF: Yes, sir. And then have
18 them keep it as evidence?

19 THE COURT: Yes, let them keep it. And
20 make sure you collect it when they come out.

21 (The bailiff conferring with jurors)

22 THE COURT Thank you, Mr. Forte

23 While we're on the record, I'm going to
24 take a liberty. I want to address some comments to
25 Mr. and Mrs. Carter and Mrs Stinnett.

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1 This has been a difficult and interesting
2 case, and I know you-all are, as we are all,
3 interested in the outcome. I wanted to share with
4 you both, however, despite the outcome, whatever it
5 may be, that you both were represented by competent
6 and professional counsel And I commend them on the
7 professionalism and competency that they displayed
8 in presenting this matter to the Court and the
9 jury

10 And you should be pleased with the
11 services that you received

12 I also want to acknowledge and state some
13 gratitude for some assistance that we had during the
14 course of these proceedings

15 From Mr Forte, of course, our court
16 bailiff, who has done a wonderful job of keeping
17 things moving smoothly Mr Hyatt, our clerk
18 Various and too numerous to count court reporters,
19 who I won't begin to name, who rotated in and out
20 And also two law students who have been assisting
21 the Court in monitoring the broadcasts that have
22 been occurring in the courtroom. Marisol Ejercito,
23 I think is how the name is pronounced, and Yolanda
24 Parker, who I suspect is still monitoring.

25 With that, we shall await the jury's

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1 verdict.

2 MR. MAXWELL: Thank you, Your Honor.

3 MR PRICHARD Thank you, Your Honor.

4 (Court in recess, 3:46-4:49 p m)

5 THE BAILIFF All rise This court is
6 again in session. Be seated, please.

7 THE COURT Please be seated.

8 Let's go on the record. Mr Forte.

9 The bailiff has reported to me that the
10 jurors have indicated they would like to get some
11 drinks I understand that defense counsel's
12 recommendation is that we simply send drinks in to
13 them I guess we should give them the option of
14 indicating what kind of drinks they would like so we
15 can go in and take some orders.

16 But before we do that, get someone on the
17 telephone from the plaintiffs' office, please, if
18 you would

19 MR. CRONIN: Your Honor, I'm sure that
20 will be fine with us.

21 THE COURT: Are you a member of the Bar?

22 MR. CRONIN No, Your Honor, I'm not.

23 THE COURT: Then you need to get someone
24 for us.

25 MR. CRONIN: Good afternoon. Can I have

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1 Woody, please Or Greg. I just want to find out if
2 they want -- if that's acceptable

3 This is Sean Judge Davis would like to
4 talk to Woody or Greg Yes, please.

5 Mr Maxwell's secretary was getting
6 Mr. Maxwell

7 THE COURT: Did they put you on hold?
8 Maybe I'm on hold The line sounds dead.

9 MR CRONIN: Does it?

10 THE COURT What is the number?

11 MR CRONIN 354-8310

12 THE COURT: The phone is dead. You broke
13 it, Mr Hyatt No, it's back

14 Mr Wilner or Mr Maxwell, please. Yes,
15 this is Judge Davis. Is Mr. Wilner in or
16 Mr. Maxwell? Is this Mr. Maxwell? You were running
17 down the stairs? Well, I thought I'd extend the
18 courtesy of giving you a call in light of the jury's
19 request, which is simply to have some drinks.

20 My intention is to send in an instruction
21 for them to indicate in writing what drinks they
22 want and get them for them. The defense has agreed
23 to that procedure Well, I haven't taken that
24 subject up with defense counsel. And if you choose
25 to do that, you-all will need to come here and I'll

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1 address it on the record.

2 Okay Very good. Thank you.

3 (Conclusion of telephone conversation)

4 THE COURT. For the record, the
5 plaintiffs' counsel has agreed to that procedure
6 Mr. Forte, so why don't you just tell them to write
7 down what drink orders they want

8 THE BAILIFF Yes, sir.

9 THE COURT: When we get them for them, who
10 pays for these?

11 MR PRICHARD We'll split it, Your
12 Honor We'll advance plaintiffs' counsel

13 THE COURT: That's magnanimous.

14 The other thing, just for your
15 information, the other thing Mr Maxwell inquired
16 about was how late I intended to keep them here.
17 And I told them we need to address that question on
18 the record with someone from their office here.

19 (The bailiff conferring with jurors)

20 MR. PRICHARD: Mr Forte, I don't --
21 they're not supposed to be told where the money
22 comes from. I'm sure the Court will explain to them
23 that it was shared by both counsel so that they
24 won't think it came from us. Okay? (Hands money to
25 the bailiff)

1 THE BAILIFF You won't be near
2 MR. PRICHARD I know that.
3 THE CLERK: Yeah, keep the change.
4 MR PRICHARD I want a receipt.
5 MR PARRISH No, I want a receipt.
6 THE BAILIFF Okay, thank you Be back
7 with them in a minute
8 (Discussion off record. The bailiff
9 delivers requested soft drinks into the jury room.)
10 THE COURT All right. The jury's request
11 has been addressed and we will stand in recess until
12 they reach a verdict.
13 THE BAILIFF. All rise. The court is
14 recessed for deliberations.
15 (Court in recess at 5:01 p m.)
16 THE COURT: Okay, we're on the record.
17 Our jury has been deliberating now for
18 four hours, approximately It's 6:30. And we
19 discussed off the record the possibility of advising
20 them of the option of getting some dinner I think
21 we need to explore the details of how we might do
22 that
23 One thing that occurs to me is that any
24 meal that we might order will take, I imagine, an
25 hour --

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1 MR. PRICHARD: Forty-five minutes.

2 THE COURT: Forty-five minutes to an hour
3 to get here. And perhaps we should, when we extend
4 the offer, alert them that that time consideration
5 should be factored into their answer as to whether
6 they want to order dinner or not.

7 The other question that comes to mind
8 is Well, maybe we don't need to ask that
9 question so long as you-all are prepared to allow
10 them to stay as long as they want to stay Perhaps
11 we shouldn't even suggest the option to them of
12 leaving and coming back tomorrow That, of course,
13 is something that we could do as well

14 Do you-all have a preference?

15 MR. PRICHARD Yes, sir Offer them the
16 option with the 45-minute delay and see what the
17 reaction is. If they're working and they want to
18 continue to work, because of the time this trial has
19 taken, that certainly seems fair. If, on the other
20 hand, they indicate they're still working but
21 they're tired of working, then it might flush them
22 out without having to ask that question.

23 I just think when you have them working,
24 it's a good thing.

25 THE COURT: I don't disagree.

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1 MR. PRICHARD: We've kept them waiting a
2 long time, too

3 MR MAXWELL: I agree.

4 THE COURT: All right Procedurally, how
5 shall we achieve that? Give Mr. Forte instructions
6 to go in and share what we've discussed and take the
7 menu with him and find out what they want to do?

8 MR. PRICHARD Yes, sir

9 MR MAXWELL: That's fine with me

10 THE COURT All right.

11 Then, Mr Forte, what I'd like you to do
12 is tell the jury that if they are interested in a
13 meal, we can make arrangements for them to have one
14 and that our best estimate is that it will take an
15 hour after the order is placed for it to be
16 delivered. And ask them if they would like for us
17 to do that And if they do, there is a menu.

18 MR PRICHARD: Deliver Steak Out, Your
19 Honor. I have six copies of the menu.

20 THE COURT: You've got six copies of
21 that?

22 MR PRICHARD: Yes, sir, more.

23 THE COURT: Then tell them they should
24 indicate what they want --

25 THE BAILIFF: Yes, sir.

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1 THE COURT. -- on the six menus.

2 THE BAILIFF. I'm glad he has that.

3 Because the one I have, they don't deliver

4 MR PRICHARD (Hands menu to the bailiff)

5 THE BAILIFF All right.

6 THE CLERK. Do you have one for the
7 clerk?

8 MR CRONIN We'll make an order, too.

9 THE COURT: Mr Forte, if they put any
10 questions to you outside of the topic of eating, you
11 need to tell them that you will have to ask me in
12 the presence of the lawyers

13 THE BAILIFF Right Yes, sir.

14 (The bailiff conferring with jurors at
15 6:37 p.m.)

16 THE BAILIFF. They asked how long they
17 would need to work before the judge would decide if
18 we came back tomorrow or not And I said, "I'll
19 have to get you the answer to that." And so as of
20 right now, they have no feel for how long it will
21 take them to finish.

22 MR. MAXWELL Your Honor, I'd recommend
23 that you advise them that if they want to adjourn
24 tonight and come back tomorrow, that would be fine.
25 Or if they wish to remain and deliberate for

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1 additional amounts of time, that would be fine as
2 well

3 MR PRICHARD: Your Honor, I was thinking
4 along the same lines, except perhaps if you brought
5 them out and said Here are the options The
6 options are eat and keep working, keep working and
7 not eat They sound like they want to -- they don't
8 know what they're supposed to do

9 THE COURT Eat and not work?

10 MR PRICHARD That's my option, Judge.
11 That's what I want to do But in any event --

12 THE COURT I don't think we better give
13 them that one No, I think I'll bring them back and
14 give them the options here in open court

15 MR PRICHARD: If they're informed, they
16 know that they can stay as long as they like. It
17 sounded like, what I think they're concerned about,
18 what are we supposed to do?

19 THE COURT: Okay.

20 (Court in recess)

21 THE BAILIFF: All rise This court is
22 again in session Be seated, please.

23 THE COURT: Before you bring them in --
24 please be seated.

25 Gentlemen, I'm probably going to take the

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1 benefit of your beneficence in providing dinner.
2 Rather than saying all of you, I'll say the Court
3 has made arrangement for the meal I take it
4 neither of you object to that?

5 MR MAXWELL. No objection, Your Honor.

6 THE COURT Okay Will you bring them in,
7 please, Mr Forte

8 THE BAILIFF: You want them seated, Your
9 Honor, at this time?

10 THE COURT. Yes, I think I'll have them
11 take their seats

12 THE BAILIFF Jury enter, please

13 (Jurors enter courtroom at 6 41 p.m)

14 THE BAILIFF Rest room right now

15 THE COURT All right, we'll wait Please
16 be seated

17 (All jurors seated at 6 42 p.m)

18 THE COURT. Lady and gentlemen, we are
19 aware that you have been deliberating now for a
20 little over four hours And because of that an
21 inquiry was made of you as to whether or not you
22 were interested in something to eat, as it is most
23 people's dinnertime And that was the reason for
24 our concern.

25 In response to our inquiry, it has come to

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1 my attention that you had questions about how long
2 you were expected to remain this evening.

3 There is no expectation. You are free to
4 remain as long as you need to remain. If you choose
5 to remain, you should know that we are prepared to
6 -- the Court is prepared to provide a meal for
7 you.

8 If your deliberations have so tired you
9 that you are not prepared to remain, then we will
10 adjourn and allow you to continue your deliberations
11 tomorrow. But the option is entirely up to you at
12 this point

13 Why don't you-all -- if you don't have any
14 questions based on what I have instructed you at
15 this point, why don't you return, make a decision
16 and alert Mr Forte as to what your decision is when
17 you make it All right?

18 JURORS. Yes, sir.

19 THE COURT: Thank you very much

20 (Jury out at 6:43 p.m.)

21 THE BAILIFF Just buzz as soon as you
22 reach a decision.

23 THE COURT: Any objections with the
24 instruction I gave?

25 MR. PRICHARD: Not at all, Your Honor.

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1 MR MAXWELL. No objection, Your Honor.

2 THE COURT All right, be seated then. We
3 shall wait

4 (Court In recess at 6 44 p.m)

5 THE COURT All right, we're on the record
6 again.

7 During our recesses, I want to admonish
8 those in the audience to remain relatively quiet. I
9 have a concern that the jury may be able to hear
10 louder-than-normal conversation and laughter in
11 particular, simply because it is more higher than
12 conversational tones

13 I certainly don't expect that you'll sit
14 here -- robots was the term I heard referred to
15 during the trial. But I would ask that you be very
16 sensitive to the noise level in the courtroom, even
17 during recesses.

18 Apparently the jury's hunger was not as
19 compelling as I thought, so we're going to stay in
20 recess until we hear from them

21 THE BAILIFF: All rise. This court is
22 recessed for deliberation

23 (Court in recess, 7 04 p.m to 7:15 p.m.)

24 THE BAILIFF: All rise. This court is
25 again in session. Be seated, please.

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1 THE COURT: Mr. Forte has advised me that
2 upon buzzing, the jury had two questions. I suppose
3 they are questions They may have been declarations.
4 I think Mr Forte said they wanted to go home.

5 The other thing was a question And it
6 was, as I understand it, whether or not I would
7 reread the law

8 My suggestion is, consistent with our
9 previous procedure, that we ask them to put their
10 concerns in writing, questions or requests or
11 whatever it is that they have on their mind at this
12 point

13 Mr Maxwell?

14 MR MAXWELL. I agree, Your Honor

15 THE COURT Mr Sheffler?

16 MR. SHEFFLER Yes, Your Honor

17 THE COURT: Mr. Forte, would you step into
18 the jury room and ask them to write down what it is
19 that they want to do and any questions that they may
20 have, please

21 THE BAILIFF: Yes, sir

22 (The bailiff conferring with jurors)

23 (Buzzer sounded by jurors at 7:18 p m.)

24 THE BAILIFF: (Hands document to the
25 Court)

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1 THE COURT. Thank you, sir

2 All right, the note is dated It reads.

3 We, the jury, request to retire for the evening and
4 continue a.m. Friday, 8/9/96. Request on 8/9
5 instruction be reread regarding the law in this
6 case

7 I'll hear from counsel

8 Mark that as a court exhibit, please,

9 No 2.

10 (The Court's Exhibit No 2 was marked for
11 identification)

12 MR. PRICHARD. Your Honor, we think that
13 request is certainly reasonable on both counts on
14 their part

15 THE COURT Mr Maxwell?

16 MR MAXWELL I don't have an objection to
17 that being done, Your Honor.

18 THE COURT. All right. Bring the jury
19 out, Mr Forte.

20 MR. MAXWELL. I assume, Your Honor, that
21 would be done tomorrow morning?

22 THE COURT: Tomorrow morning, nine a.m. is
23 my intention, unless there is a request for a
24 different time

25 (Jury enters courtroom at 7.19 p.m.)

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1 THE COURT. Please be seated. Good
2 evening, lady and gentlemen We are prepared to
3 honor both of your requests, so that we will stand
4 in recess until nine a m tomorrow morning, at which
5 time the instructions on the law which were read to
6 you previously will be reread

7 I need to advise you particularly, now
8 that you are in the midst of your deliberations, of
9 the importance of the fact of the court order not to
10 discuss the case with anyone, not to permit the case
11 to be discussed in your presence by anyone, nor to
12 discuss the case among yourselves outside of the
13 jury room I'm sure that you-all understand and
14 will follow that instruction

15 And with that, I will -- we all will see
16 you tomorrow morning at nine a.m. Thank you very
17 much.

18 THE BAILIFF Nine, Your Honor? Nine?

19 THE COURT Nine a.m.

20 THE BAILIFF. All rise This court is
21 recessed till 9-00 tomorrow morning by this clock.

22 (The proceedings were adjourned at
23 7:20 p m., to be reconvened at 9 00 a.m. on Friday,
24 August 9, 1996.)

25 - - -

ACCURATE REPORTING SERVICE OF JACKSONVILLE, INC.

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STATE OF FLORIDA)

COUNTY OF DUVAL)

The following individually named reporters certify that we were authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of our stenographic notes.

We further certify the original transcript will be delivered to J. W. Prichard, Jr., Esquire, attorney for defendant for filing with the court or his safekeeping

DATED this 8th day of August 1996.

(Pages ___ through ___)
Leslie M. Roach, RPR

Sandra Crowley, CSR, RMR
(Pages ___ through ___)

Georgia J. Winegeart, RPR
(Pages ___ through ___)

F. Darlene Ricketson
(Pages ___ through ___)

(Pages ___ through ___)
Pamela Chafin Roach, RPR

ACCURATE REPORTING SERVICE OF JACKSONVILLE, INC.

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

GENERAL JURISDICTION

CASE NO . 95-00934-CA

DIVISION. CV-B

GRADY CARTER and
MILDRED CARTER,

Plaintiffs,

vs.

BROWN & WILLIAMSON TOBACCO
CORPORATION, as successor by
merger to THE AMERICAN TOBACCO
COMPANY,

Defendant.

PROCEEDINGS held before The Honorable
Brian J. Davis at the Duval County Courthouse,
330 East Bay Street, Jacksonville, Florida, on
Friday, August 9, 1996, at 8:53 a.m., before Pamela
Chafin Roach, Registered Professional Reporter-CP,
and Notary Public in and for the State of Florida at
Large.

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P R O C E E D I N G S

Friday, August 9, 1996

8:53 a.m.

- - -

(Present in chambers are: Norwood S. Wilner, Esq., Gregory H Maxwell, Esq., Sean Cronin, Thomas E Riley, Bruce G. Sheffler, Esq., Tom Bezanson, Esq., Steven L Vollins and J. W. Prichard, Jr., Esq)

THE COURT: Good morning.

It's apparent to me that the jury's request that the instructions be reread events some confusion concerning the law I've had the opportunity to look over the instructions and am going to propose some structural changes that I hope will aid their clarity.

You-all might follow along with me. And if you have objections to any of the proposed changes, I will hear them.

The most bothersome one to me is the charge on their consideration of the defective product claim. And I'll tell you the bases of my concern.

Instruction No. 15A is the only instruction that is prefaced with the term "to recover under plaintiffs' theory of liability for

1 design defect." And in rereading the instructions,
2 I noticed that that phrase, "to recover," was also
3 mentioned on the second page of what -- well,
4 actually on an introductory sentence to 15B.

5 My concern is that the choice of those
6 words, "to recover under plaintiffs' theory of
7 liability," confuses the theories under the
8 defective products cause of action that they may
9 consider

10 As I understand it, there are three. The
11 first being the product's defectiveness based on it
12 being unreasonably dangerous. The second being the
13 product being defective as unreasonably dangerous
14 because it did not include a warning And the third
15 being the product being unreasonably dangerous
16 because of the risk associated with the design
17 outweighing the benefits.

18 Does that fairly summarize the theories of
19 law that the jury might choose in finding a product
20 defective? Then I'll hear from you as to why it
21 doesn't.

22 MR. SHEFFLER: Well, Your Honor, it was my
23 understanding of the law -- and maybe I shouldn't
24 speak; I wasn't in the charge conference. But I
25 thought there was two defects alleged in this case.

1 One defect -- and to be an unreasonably dangerous
2 product, the product has to be defective.

3 THE COURT: Right

4 MR. SHEFFLER: That's the first premise of
5 Florida product liability law. And the only two
6 defects for Lucky Strikes that were alleged in this
7 case, and the only two defects that have been in
8 this case, was that the product was defective
9 because it did not have a warning or the product was
10 defective because it was inappropriately designed.

11 Those are the only two defects that have
12 ever been argued or alleged or part of the case

13 As to the first defect, the product was
14 defective because it didn't have a warning, I think
15 the charge is in error. As to the second defect,
16 the product is defective because it was
17 inappropriately designed, the law is quite clear
18 that to establish that defect the plaintiff had to
19 show, number one, that there was a feasible
20 alternative and, number two, the alternative be
21 used.

22 THE COURT: And I'm not disagreeing with
23 you. And I intend to continue to give 15A. It is a
24 matter of what choice of words I use to describe the
25 findings the jury must make with regard to the

1 defective design prong of the products liability
2 claim, strict liability claim.

3 Let me tell you what I'll propose and
4 you-all can tell me your concerns

5 As I said, I don't think this changes the
6 substance of the instructions. But I believe, given
7 the choice of words employed previously, that what I
8 have proposed will aid in the clarity. This is
9 instruction No. 15 as I propose it

10 The issues for your determination on the
11 claim of plaintiffs Grady and Mildred Carter against
12 the defendant are whether the Lucky Strike
13 cigarettes manufactured and sold by The American
14 Tobacco Company were defective when they left the
15 possession of The American Tobacco Company and, if
16 so, whether such defect was a legal cause of loss or
17 injury or damage sustained by the plaintiffs Grady
18 and Mildred Carter.

19 A product is defective if by reason of its
20 design the product is in a condition unreasonably
21 dangerous to the user of the product and the product
22 is expected to and does reach the users without
23 substantial change affecting the condition. A
24 product is unreasonably dangerous if it is dangerous
25 to an extent beyond that which would be contemplated

1 by the ordinary consumer who purchases it, with the
2 ordinary knowledge common to the community as to its
3 characteristics

4 A product is also defective if it is
5 unreasonably dangerous and placed in the hands of a
6 consumer without a warning. This does not mean that
7 to prevent a product from being deemed unreasonably
8 dangerous a warning must always be given. There is
9 a duty to warn only when the hazards associated with
10 the use of the product are not obvious, not
11 reasonably apparent, or not as well known to the
12 user as to the manufacturer

13 A product is also unreasonably dangerous
14 because of its design if the risk of danger in the
15 design outweighs the benefits.

16 In determining whether the risk of danger
17 in the design outweighs the benefits of Lucky Strike
18 cigarettes, you must determine, one, whether the
19 alleged injuries plaintiff Grady Carter sustained as
20 a result of the challenged design for Lucky Strike
21 cigarettes would have been avoided, or less severe,
22 had The American Tobacco Company used a feasible and
23 alternative design and, two, whether the enhanced
24 danger posed by the challenged design outweighed the
25 added cost, if any, to The American Tobacco Company

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1 and, three, whether plaintiff Carter -- plaintiff
2 Grady Carter would have used the product employing
3 the alternative design instead of the Lucky Strike
4 cigarettes that he did smoke and that if he had used
5 the product with this alternative design his
6 injuries would have been avoided.

7 MR. WILNER: Your Honor, I would only
8 comment that his injuries would have been avoided, I
9 think, or reduced

10 THE COURT Well, I don't know that that
11 was what we had previously agreed to.

12 MR. MAXWELL Oh, okay

13 THE COURT But I'll hear you in terms of
14 the -- because I think that may materially change
15 the law that I previously gave. I don't believe
16 that my changes materially change the law that they
17 were previously instructed on, but I'll hear from
18 counsel as to why you believe they do.

19 MR. PRICHARD: Sounds like, Judge -- and I
20 think I caught most of it -- that you're really
21 substituting "in determining" rather than "to
22 recover."

23 THE COURT: That's correct.

24 MR. PRICHARD: The major change is the use
25 -- and I injected the word "also," because I think

1 that -- I want to distinguish between the theories
2 upon which they might base the claim And I don't
3 think that I had previously done that.

4 The other reason for adding "in
5 determining whether the risk of danger in the design
6 outweighs the benefits" is I think this language,
7 "to recover under plaintiffs' theory of liability
8 for design defect" in 15A is the only time in the
9 entire instruction that we used the term "to recover
10 under plaintiffs' theory." And it unduly
11 emphasizes, I think, the jury's consideration of
12 that particular theory

13 The other thing that you will notice on
14 what we had identified as 15B which previously read,
15 "For plaintiffs Grady and Mildred Carter to recover
16 under their design defect theory, you must also
17 determine whether plaintiff Grady Carter would have
18 used," that's the second time that the factors to be
19 considered in their determination of the design
20 defect risk versus benefits analysis is used.

21 And what I did was incorporate that into
22 15A by simply striking that language and adding it
23 as a third consideration.

24 MR. SHEFFLER: The only -- I'm sorry, Your
25 Honor. But the only thing that I would mention is

1 that the issue of -- by changing it to
2 determination, obviously this is the only charge on
3 the design defect claim, and it doesn't -- in the
4 other claims it's clear because of their link to
5 legal cause and the requirement for proximate cause
6 for those claims built into those claims, it's clear
7 that plaintiff has burden of proof on this.

8 In this charge I think determination is
9 not the same as "plaintiff to recover" or "plaintiff
10 to succeed" or "plaintiff to establish" or
11 "plaintiff to" . You know, there's something here
12 that we need to show the burden of proof on the
13 plaintiff

14 MR MAXWELL That's done in a separate
15 instruction. No. 9, I think.

16 THE COURT: Let me tell you-all what I've
17 been trying to do, is get some symmetry to the
18 instructions, both in the choice of words that we
19 use where they are interchangeable, given the two
20 theories, and use of the same words when at all
21 possible in the alternate theories.

22 And in looking at the negligence claim in
23 that regard, Mr. Sheffler, I don't recall -- it
24 says -- and this is No 8: "In your deliberations
25 you are to consider" -- no, I'm sorry, that's the

1 wrong one.

2 MR. SHEFFLER: I think it's No. 10.

3 THE COURT: You're right. The issues for
4 your determination on the negligence claim is
5 whether the defendant was negligent. And then it
6 goes then into definition.

7 The burden of persuasion is No. 9, which
8 clearly sets out the burden in the entire case as
9 submitted to the jury. No. 9.

10 MR VOLLINS: Your Honor, may I just point
11 something out, that when we were talking about the
12 instructions two days ago I originally proposed a
13 larger instruction on burden And I backed off of
14 that, I think largely because I realized that we
15 also had burden language which is incorporated now
16 in No. 15. I obviously don't think I would have
17 backed off of that if I felt that the language in 15
18 was going to be taken out.

19 If you remember, I had like basically
20 another few sentences here talking about the burden,
21 that plaintiffs had the burden on all of their
22 claims.

23 MR. SHEFFLER: And judge, if I may --

24 THE COURT: Just let me find out where it
25 is that the larger burden or enhanced burden

1 language on 15 is, where I've removed that from what
2 I gave yesterday, because -- unless you mean "to
3 recover under plaintiffs' theory of liability" is
4 addressing burden.

5 MR. SHEFFLER: I think that's what we are
6 saying.

7 THE COURT: Okay.

8 MR. SHEFFLER: And the question is, in the
9 negligence claim on No 10 we do have in there "if
10 the greater weight of the evidence does not support
11 the claim."

12 THE COURT Oh, no, I haven't gotten that
13 far Also, you weren't part of the instructions
14 yesterday. But one of the things that I effected in
15 the order that I gave was the placement of the
16 greater weight of the evidence language at the
17 conclusion of both of the theories of liability.
18 And it's at the end of the negligence action, and
19 it's also at the end of the product defect claim.

20 MR. SHEFFLER: Okay.

21 THE COURT: And I have tried to again
22 achieve some symmetry. If you'll notice in that
23 language on page -- let's see. On instruction 10,
24 the third page of that, it begins: "If the greater
25 weight of the evidence does not support the

1 negligence claim of Grady and Mildred Carter."

2 What we previously said in instruction
3 No 31, 32... I guess it's what I had denominated
4 as 15E, the second page of that But it reads: "If
5 the greater weight of the evidence does not support
6 the claim of Grady Carter, your verdict should be
7 for defendant "

8 Now, that was what followed the defective
9 products claim.

10 That's confusing, because that suggests
11 that everything that I've read -- well, may not be.
12 But clarity is achieved if I rather cause this to
13 read: "If the greater weight of the evidence does
14 not support the defective product claim of Grady
15 Carter and Mildred Carter" -- that was left out
16 previously and it shouldn't have been -- "then your
17 verdict should be for -- then your verdict on the
18 defective product claim should be for the
19 defendant." Which is what we've done exactly in the
20 negligence claim.

21 The same kind of change would be made in
22 the next paragraph, which now reads: "However, if
23 the greater weight of the evidence does not support
24 the claim of claimants Grady and Mildred Carter,
25 then your verdict should be for claimants Grady and

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1 Mildred Carter and against defendant."

2 If you look at the parallel language in
3 the negligence claim, this should then read: "If,
4 however, the greater weight of the evidence does not
5 support the defective product claim of plaintiffs
6 Grady and Mildred Carter, then your verdict should
7 be for plaintiffs in the total amount of their
8 damages." Or if we chose to use the other language
9 that had been included. "For plaintiffs Grady and
10 Mildred Carter and against the defendant."

11 MR. MAXWELL: I'm sorry, Your Honor, I'm a
12 little confused Are we looking at page 13? Would
13 be -- look at 15, page three of 15 at the bottom,
14 the last two paragraphs there I think this is what
15 Your Honor was suggesting be modified.

16 THE COURT: Page three of 15?

17 MR. MAXWELL: Yes.

18 THE COURT: No, let me tell you the
19 problem that you're having. We did some cutting and
20 pasting yesterday. Remember we incorporated a 15A,
21 a 15B, a 15C?

22 MR. MAXWELL: Right.

23 THE COURT: My page, the third page of my
24 15 now is something that's been cut and paste --
25 pasted, rather. But tell me the language that you

1 are looking for.

2 MR. MAXWELL: Well, just listening to Your
3 Honor reciting the language of this concerning the
4 greater weight of the evidence. And I don't know if
5 you had redrafted it or if you misspoke.

6 The paragraph I have that I believe was
7 read is. "If the greater weight of the evidence
8 does not support the claim of Grady Carter" -- and I
9 think you wanted to insert "and Mildred Carter."

10 THE COURT: Correct

11 MR. MAXWELL: "Your verdict should be for
12 defendant."

13 THE COURT. Right.

14 MR. MAXWELL: And I guess it would be:
15 "If the greater weight does not support the" -- you
16 wanted to insert there "defective product claims"?

17 THE COURT: Right. I wanted to do that in
18 both of those paragraphs.

19 MR. MAXWELL: Okay.

20 THE COURT: And let me read it again so
21 that you'll know what I propose.

22 "If the greater weight of the evidence
23 does not support the defective product claim of" --
24 and perhaps it should be "claims." Of... "Claims
25 of Grady Carter and Mildred Carter, then your

1 verdict on the defective product claims should be
2 for the defendant. If, however, the greater weight
3 of the evidence does not support the defective
4 product claims of plaintiffs Grady and Mildred
5 Carter" --

6 MR. MAXWELL: Excuse me to interrupt, Your
7 Honor.

8 THE COURT: Okay.

9 MR. MAXWELL: Mine read: "However, if the
10 greater weight of the evidence does support the
11 claim -- claims." I thought you said "does not
12 support."

13 THE COURT: Did I say "does not"? Then I
14 misspoke

15 MR. MAXWELL: Okay. That's what confused
16 me.

17 THE COURT: In this paragraph it should
18 read: "If, however, the greater weight of the
19 evidence does support the defective product claims
20 of plaintiffs Grady and Mildred Carter, your verdict
21 should be for the plaintiffs in the total amount of
22 their damages."

23 MR. MAXWELL: Okay. In the total amount
24 of their damages?

25 THE COURT: Which is what we had

1 previously stated in the negligence claim.

2 And then it goes on to say "greater weight
3 of the evidence means the more persuasive force."

4 MR. MAXWELL: Right. We have no objection
5 to that change, Your Honor, to those changes.

6 THE COURT: Let me take you to another
7 change.

8 MR. PRICHARD: I think the change is on
9 15 Very beginning, Judge, on 15.

10 THE COURT: Yes, sir.

11 MR. PRICHARD: Didn't you change something
12 right off the bat?

13 THE COURT: On 15?

14 MR. PRICHARD: Yes, sir.

15 THE COURT: "In determining whether the
16 risk of danger in the design outweighs the benefits
17 of."

18 MR. PRICHARD: I think it was page two of
19 15. The paragraph starting: "A product is
20 defective if it is unreasonably dangerous."

21 THE COURT: "Is also defective."

22 MR. PRICHARD: You've interlineated
23 "also"?

24 THE COURT: Correct.

25 MR. PRICHARD: And then what we're calling

1 page three where the insert, cut and paste, took
2 place, if I understand those two changes, in the
3 greater weight of the evidence and defective
4 product. Is that where we are?

5 THE COURT: Right.

6 Okay, on instruction 18.

7 MR. PRICHARD: One more question, Your
8 Honor.

9 THE COURT: Okay.

10 MR. PRICHARD: 15A, you had changed it to
11 recover language. I believe that was the other.

12 MR. MAXWELL Yes, that should read "in
13 determining."

14 THE COURT: 15A will now read -- and I'll
15 only read it to the point where -- or shortly beyond
16 the point where there has been a change. It will
17 begin: "In determining whether the risk in danger
18 in the design outweighs the benefits of Lucky Strike
19 cigarettes, you must" --

20 MR. PRICHARD: Hold it. I'm not with
21 you. I'm not on 15A.

22 THE COURT: You're on 15A?

23 MR. PRICHARD: No, sir, 15A originally
24 read: "To recover under plaintiffs' theory of
25 liability for design defect."

1 THE COURT: Exactly. I'm striking "to
2 recover under plaintiffs' theory of liability for
3 design defect" and inserting there: "In determining
4 whether the risk of danger in the design outweighs
5 the benefits of Lucky Strike cigarettes, you must
6 determine, one." And then it goes on as previously
7 indicated.

8 MR. PRICHARD: In determining whether the
9 -- I didn't write very fast. The risk?

10 THE COURT: Uh-huh (affirmative). "Of
11 danger in the design outweighs the benefits of Lucky
12 Strike cigarettes, you must determine, one, whether
13 the alleged injuries .." And then it goes on.

14 If you flip to 15B, Mr. Prichard.

15 MR. PRICHARD: Yes, sir.

16 THE COURT: 15B should be the very next
17 one. That reads: "For plaintiffs Grady and Mildred
18 Carter to recover under the design defect theory,
19 you must also determine."

20 MR. PRICHARD: Yes, sir.

21 THE COURT: That will be stricken. Strike
22 that language on your copy. "For plaintiffs Grady
23 and Mildred Carter to recover under the design
24 defect theory, you must also determine." And insert
25 before the word "whether" the parenthetical No. 3.

1 All right. Now, go back to the last page
2 of 15A -- or 15A for a minute. And instead of the
3 paragraph ending with a period, it should be a
4 comma, "and." Follow me?

5 MR. PRICHARD: Yes, sir

6 MR. MAXWELL. Yes, sir.

7 MR. VOLLINS: Your Honor, can I raise one
8 concern? That the reason why the language was
9 drafted the way it was drafted originally is that
10 plaintiffs only have one theory for design defect.
11 They dropped their consumer expectation test.
12 They're only pursuing the risk utility claim.

13 And I think that this doesn't expressly
14 state that or take into consideration the fact
15 they're only pursuing risk utility.

16 Now I think the jury is free to also
17 consider consumer expectation, which is something
18 that plaintiffs clearly dropped.

19 MR. SHEFFLER: He's talking about 15,
20 Judge, I think, where it says --

21 MR. WILNER: There's consumer expectation
22 in these instructions.

23 MR. SHEFFLER: I know. That's what he's
24 saying. You dropped that claim so --

25 MR. WILNER: Take that out?

1 MR. SHEFFLER: Yeah, the product...

2 Your Honor, I think the issues -- 15, a
3 product is defective if by reason of its design the
4 product is in a condition unreasonably dangerous to
5 the user of the product and the product is expected
6 to and does reach the users without substantial
7 change, blah-blah-blah, unreasonably dangerous.
8 That is the claim that was dropped. And I guess
9 what we're saying --

10 MR WILNER: They asked for it. We didn't
11 mind taking it out.

12 MR. SHEFFLER: So we go from the first
13 paragraph on 15 straight to: " A product is
14 defective" --

15 THE COURT: Actually, it's the second
16 paragraph, isn't it?

17 MR. MAXWELL: Yes.

18 MR. SHEFFLER: Yeah, in other words --

19 THE COURT: No, I knew what you meant, but
20 I heard what you said, too. You said the first
21 paragraph.

22 MR. SHEFFLER: I'm sorry.

23 THE COURT: That's all right.

24 MR. SHEFFLER: I apologize.

25 THE COURT: But what you're saying is, we

1 should strike: "A product is defective by reason of
2 its design -- if by reason of its design the
3 product is in a condition unreasonably dangerous to
4 the user of the product and is expected to and does
5 reach the users without substantial change affecting
6 that condition "

7 MR. WILNER: No, no, no That's not the
8 part that gets struck, because that's the part, as I
9 understand --

10 THE COURT: Then let me ask this
11 question The very next sentence, then.

12 MR. WILNER. Right

13 THE COURT: "A product is unreasonably
14 dangerous if it is dangerous to an extent beyond
15 that which would be contemplated by the ordinary
16 consumer."

17 MR. SHEFFLER: Judge, here's my point.
18 I'm not sure -- let me just say it and maybe we can
19 talk about it.

20 THE COURT: All right.

21 MR. SHEFFLER: As I understand the claims
22 of the case, it's unreasonably dangerous if it
23 doesn't have a warning or it's unreasonably
24 dangerous if it's not designed correctly.

25 So the unreasonably dangerous with respect

1 to consumer expectation is withdrawn. So I think
2 paragraph two in its entirety should be dropped.
3 Because, otherwise, if you listen to the jury
4 instruction you might think that a product is
5 defective if it's dangerous and gets to the user.
6 And that, of course, isn't the law. That would be
7 absolute liability.

8 So the reason why the consumer expectation
9 thing was in there was to explain the first sentence
10 of paragraph two. If we're not into consumer
11 expectations at all, all of paragraph two is
12 superfluous and we go on to the two defects for the
13 product in this case, which is failure to warn or
14 design

15 MR. WILNER: Right, I understand what
16 you're saying. Because here the risk utility test
17 is in the third page. A product is also -- just
18 take out. Okay, "also" would be all right. Because
19 the design defect and the risk utility and the risk
20 utility... Excuse me for just talking out loud.

21 THE COURT: That's okay.

22 MR. WILNER: In evaluating the
23 reasonableness... If the risk of danger outweighs
24 the benefits.

25 All right, so here... That's standard

1 jury language. That doesn't do any... The second
2 sentence is what should be struck. Seems to me that
3 is valid for all claims. That first introductory
4 language has to say it's in a condition unreasonably
5 dangerous to the user and is expected to and does
6 reach the users without substantial change affecting
7 the condition.

8 Now, I don't care. Is that what you want
9 out? There is no evidence about it being a change
10 from the time that --

11 MR. SHEFFLER. No, it seems to me --

12 MR. WILNER: I mean, I don't really...

13 MR. SHEFFLER Judge, the way you've
14 redrafted this, I think, is clear.

15 MR. WILNER: Right.

16 MR. SHEFFLER: Because it simply sets
17 forth --

18 MR. WILNER: I don't care.

19 MR. SHEFFLER: There's two ways they can
20 recover. Failure-to-warn defect or design defect
21 and the elements of both. And I think if you delete
22 the entire paragraph, because consumer expectation
23 is out --

24 MR. WILNER: Is out. That would be fine
25 with me because I think that -- and especially this

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1 business about "doesn't reach the user in the same
2 condition" is not really an issue in the case.

3 MR. SHEFFLER: There has never been any
4 proof of that.

5 MR. MAXWELL: So we're striking that
6 entire --

7 MR. PRICHARD: Starting at the bottom of
8 page one on instruction 15?

9 MR. MAXWELL: Yes.

10 MR. VOLLINS: I think the word "also"
11 doesn't have to be included in this.

12 MR. PRICHARD: Correct

13 MR. WILNER: Well, it does because we have
14 the design side and this is --

15 MR. PRICHARD: This is the leading
16 paragraph.

17 THE COURT: No, this is --

18 MR. WILNER: Oh, I understand. Okay.

19 MR. PRICHARD: So "also" would come out
20 then and start: "A product is defective if it's
21 unreasonably dangerous and placed in the hands of a
22 consumer without a warning."

23 MR. WILNER: Right.

24 THE COURT: I'm sorry. I'm sorry to cause
25 this confusion, but I'm actually trying to provide

1 some clarity. Because when I read them last night,
2 some of these divergences jumped out at me.

3 MR. WILNER: I think this is the real
4 loose end of these kind of cases, these technical
5 instructions, reading them to the jury.

6 THE COURT: Okay, let me then --

7 MR. PRICHARD: Also then on page -- before
8 the inserts "a product is unreasonably dangerous,"
9 that should be "also" there; is that correct?

10 MR. WILNER: Right.

11 THE COURT: Okay.

12 MR. VOLLINS: Well, no, that shouldn't be
13 "also," because -- no, you're right, I'm sorry.

14 MR. PRICHARD: That's the second prong
15 that's left.

16 MR. WILNER: All right.

17 THE COURT: All right. Now, let's see.
18 If you'd go to 18 with me. Now if I can just read
19 them right today, I'll feel better about it.

20 Okay, if you look at 18. Okay. 18, the
21 second page. And this occurred to me yesterday
22 while I was reading it. The first page of 18
23 reads: "You should consider the following
24 elements." Then it says: "Any bodily injury
25 sustained by Grady Carter."

1 And then the next element is: "Any loss
2 by Mildred Carter of the services." And that
3 delineation wasn't enunciated well by me, because of
4 the way this was written.

5 I think part of the reason for that was
6 that the second page of instruction 18 includes the
7 language in the last sentence of the first
8 paragraph, "There is no exact standard for measuring
9 such damage. The amount should be fair and just in
10 light of the evidence." That language is included
11 in the first -- at the end of the first paragraph
12 and at the end of the very next paragraph concerning
13 Mildred Carter's claim

14 What I propose is this language, which
15 essentially strikes the last sentence of the first
16 paragraph on page two of instruction 18 so that it
17 would then read, beginning at the bottom of
18 instruction No. 18: "You should consider the
19 following elements." I actually enumerated them:
20 "One, any bodily injury sustained by Grady Carter
21 and any resulting pain and suffering, disability or
22 physical impairment, disfigurement, mental anguish,
23 inconvenience, loss of capacity for the enjoyment of
24 life experienced in the past or to be experienced in
25 the future and, two, any loss by Mildred Carter of

1 the services, comfort, society and attentions of
2 Grady Carter, in the past and in the future, by
3 reason of her husband's injury. There is no exact
4 standard for measuring such" -- and maybe this
5 should be "damages" at this point. "The amount
6 should be fair and just in light of the evidence."

7 MR. SHEFFLER: Your Honor...

8 THE COURT: Do you understand that --

9 MR. SHEFFLER: No, I do, Judge, and I'm
10 just trying to say -- and I think that's very good.
11 I do think that's a good way to do it Because it
12 was long and --

13 THE COURT Awkward.

14 MR. SHEFFLER: Awkward. But could we
15 say. "There is no exact standard for measuring
16 either type of damage" so that we make sure that
17 when we say no exact standard we are not just
18 referring to the second part?

19 THE COURT: There is no exact standard for
20 measuring...

21 MR. WILNER: Such damages?

22 THE COURT: He wants to distinguish. And
23 I understand that. Either type --

24 MR. SHEFFLER: Either damage.

25 MR. WILNER: What is the "either,"

1 though?

2 MR. SHEFFLER: One and two.

3 THE COURT: It's Mr Carter's --

4 MR. WILNER: Oh, I see.

5 THE COURT: -- as compared --

6 MR. SHEFFLER: With one and two.

7 THE COURT: Yeah, as compared with now
8 Mrs. Carter's. For measuring either damage. Either
9 damage. "Either damage" may do it. "There is no
10 exact standard for measuring either damage."

11 MR. WILNER: "Damage," singular?

12 THE COURT: Yeah. If you use "either,"
13 then it would be singular Either damage. "The
14 amount should be fair and just in light of the
15 evidence."

16 MR. WILNER: Your Honor, all I would say
17 is, I think the standard instruction says "such
18 damage." There is no such standard for measuring
19 such damage for either one.

20 I don't want to quibble. There's no point
21 in quibbling. Either one is okay.

22 THE COURT: That was it, gentlemen.

23 MR. WILNER: Yes, Your Honor. Subject to
24 our objections at the trial -- at the charge
25 conference, Your Honor's suggestions are acceptable

1 to plaintiff

2 THE COURT: Understood. Those objections,
3 as well as defendant's, are still of record. And
4 any that you wish to state to the changes that I
5 proposed will be, as well. Either wish to state or
6 have stated.

7 MR. PRICHARD All right, sir.

8 THE COURT: I don't want to suggest that
9 you-all are waiving your rights. But I think I may
10 have achieved a little clarity in the revisions.

11 MR. WILNER: One day there will be a
12 committee meeting to put plain language in jury
13 instructions. And it will be an interesting --

14 THE COURT: I'm on that committee.

15 MR. WILNER: Is there such a committee?

16 THE COURT: No, there is.

17 MR. WILNER: I was just guessing that
18 there should be.

19 THE COURT: No, there is in fact such a
20 committee, and I have the honor of serving on it.
21 We meet quarterly, as a matter of fact.

22 MR. WILNER: I'd like to be a fly on that
23 wall.

24 THE COURT: It's a very interesting
25 committee. Because this is a difficult --

1 MR. WILNER: Yeah, it's tough.

2 THE COURT: -- area.

3 Okay, anything else?

4 MR. WILNER: No, Your Honor.

5 THE COURT: Mr. Prichard?

6 MR. PRICHARD: No, Your Honor.

7 MR. SHEFFLER: The only question I have,
8 Judge, is, should we tell the jury, because there
9 might be some confusion, for clarity?

10 THE COURT: Yes, I'm glad you mentioned
11 that, that my intention was to tell them I will now
12 reread the instructions on the law, as you
13 requested. Please know that there have been
14 modifications, not in substance but in form, to
15 assist clarity. Or something to that effect.

16 MR. WILNER: Yes, Your Honor. Thank you,
17 Your Honor.

18 (The hearing was concluded at 9:31 a.m.)

19 - - -

20 Friday, August 9, 1996 9:38 a.m.

21 (Jury absent)

22 THE BAILIFF: All rise. This court is
23 again in session.

24 Be seated, please.

25 MR. PRICHARD: Your Honor, can we approach

1 before we --

2 THE COURT: Yes, sir.

3 (Side-bar conference held outside the
4 hearing of the jury)

5 MR. PRICHARD: Judge, I want to indicate
6 for the record that we just got here in the
7 courtroom at 9:30. The jury had been assembled here
8 in the courtroom since apparently nine or before,
9 for at least a half hour or more, with some of the
10 parties in here, with the onlookers in here. And
11 apparently, according to the bailiff, he was also
12 here.

13 And I object strenuously to the way that
14 the bailiff is handling the jury. When the jury
15 shows up in the morning, they should be permitted to
16 go into their refuge, into the jury room, and await
17 the beginning of proceedings instead of being
18 required to stand out here in the courtroom with all
19 the people coming in and out discussing the case,
20 with the Carters sitting in here while the lawyers
21 are back in chambers.

22 Your Honor, the bailiff is a loose cannon,
23 and I'm really concerned that he doesn't understand
24 the concept of trying to protect this jury when
25 they're here, where the activity is focused, of

1 being subjected to loose talk or not loose talk.

2 Personally, even though the lawyer is
3 here, whenever they are in this courtroom that's the
4 way it should be. When they show up, they should go
5 in the jury room and not be required to stay out
6 here under some concept that the bailiff had that
7 the evidence is in the room and not want them to
8 look at it or something

9 I'm very concerned about Mr Forte's
10 behavior And he indicated to me that he had told
11 you, Your Honor, that's what he was going to do. I
12 suspect that he got his instructions confused.
13 Because they were all standing out here, around the
14 telephone, around the jury box, when spectators and
15 parties were milling about.

16 It's just a situation after a three-week
17 trial that is fraught with the opportunities for
18 tainting the jury.

19 THE COURT: The error is not Mr. Forte's,
20 it's mine. He did ask me whether I wanted the jury
21 to assemble in the jury room. And I told him that I
22 would confer with counsel as to their preference,
23 that because the jury had requested to be
24 reinstructed on the law, that their consideration of
25 the evidence without that instruction might be

1 improper. And it was my oversight, given the
2 attention I needed to give to the jury instructions,
3 in failing to bring that question up to you at the
4 beginning of our conference this morning.

5 Now, the question, I think, is whether or
6 not you're aware of any improprieties with regard to
7 the jury. I understand your suspicion. I did
8 instruct Mr. Forte to secure the jury and to keep
9 them out of harm's way, so to speak.

10 Are you aware of any?

11 MR. PRICHARD: Your Honor, I've not had
12 the opportunity to conduct inquiry of perhaps some
13 of the people that were here at the same time to see
14 what goes on. I just wanted to get it on the record
15 before we started the proceedings this morning,
16 because it concerned us that there may have been
17 prejudice inuring to them.

18 We will conduct an inquiry of folks that
19 were here to see if anything was said that was in an
20 untoward manner.

21 THE COURT: All right. Then you should
22 let me know if you discover anything.

23 MR. MAXWELL: I will do the same.

24 MR. WILNER: We have been instructing,
25 pursuant to our earlier conversation, all of our

1 people in any way affiliated with us to avoid making
2 any comments in the presence of the jury.

3 The jury has been out during lunch
4 sometimes walking back, and we've been very careful
5 and scrupulous to avoid any comments or anything
6 they could overhear whatsoever.

7 So it doesn't -- I understand the jury has
8 been with us on occasion, on breaks and things. And
9 I don't think that anyone to this day has ever
10 suggested that they've heard anything. When they go
11 back into the world, you know, walking down the
12 halls, going home, who knows? I think they've heard
13 everything.

14 So I just think -- it didn't trouble me
15 greatly to see anything that has gone on so far,
16 Your Honor. I think it's quite okay.

17 THE COURT: Okay. We'll see.

18 MR. PRICHARD: I would simply note that at
19 some time earlier in the proceedings we had
20 requested that. And I think attempts have been made
21 to adhere to that request, that when the jury is on
22 recess or on breaks or not in deliberations, even on
23 the phone, that they either be away from the
24 courtroom or in the jury room.

25 Because these reporters are all out there

1 talking. They don't know who's on the jury.
2 Certainly I know the parties -- and there's no
3 accusation here or any inference that either side
4 has done anything to speak out of line around the
5 jury. Because they know who the jury is. Some of
6 these people don't.

7 Again, I would emphasize that if they are
8 permitted to leave the jury room today that the same
9 instruction be given. Either be away or in their
10 room. There's just too many people that are talking
11 that we have no control over, either side.

12 MR. MAXWELL: I agree

13 MR. PRICHARD: It's a very difficult --
14 might as well give them some of the newspapers to
15 read if we're going to do that. The impact could
16 very well be the same. We both want to avoid that.

17 THE COURT: All right. Thank you very
18 much.

19 (Side-bar conference concluded;
20 proceedings resumed)

21 THE COURT: All right, Mr. Forte, bring
22 the jury in, please.

23 (Jury present at 9:47 a.m.)

24 THE COURT: Please be seated.

25 Good morning, lady and gentlemen.

1 Members of the jury, I shall now
2 reinstruct you on the law that you must follow in
3 reaching your verdict. Please know that the
4 instructions have been modified, not in substance
5 but in form to assist clarity

6 It is your duty as jurors to decide the
7 issues and only those issues that I submit for
8 determination by your verdict. In reaching your
9 verdict, you should consider and weigh the evidence,
10 decide the disputed issues of fact, and apply the
11 law on which I shall instruct you to facts as you
12 find them from the evidence

13 The evidence in this case consists of the
14 sworn testimony of witnesses, all exhibits received
15 in evidence, and all facts that may be admitted or
16 agreed to by the parties..

17 In determining the facts, you may draw
18 reasonable inferences from the evidence. You may
19 make deductions and reach conclusions which reason
20 and common sense lead you to draw from the facts
21 shown by the evidence in this case. But you should
22 not speculate on any matters outside the evidence.

23 In determining the believability of any
24 witness and the weight to be given the testimony of
25 any witness, you may properly consider the demeanor

1 of the witness while testifying; the frankness or
2 lack of frankness of the witness; the intelligence
3 of the witness; any interest the witness may have in
4 the outcome of the case; the means and opportunity
5 the witness had to know the facts about which the
6 witness testified; the ability of the witness to
7 remember the facts about which the witness
8 testified; and the reasonableness of the testimony
9 of the witness, considered in light of all the
10 evidence in the case and in the light of your own
11 experience and common sense.

12 You have heard opinion testimony from
13 persons referred to as expert witnesses.

14 You may accept such opinion testimony,
15 reject it, or give it the weight you think it
16 deserves, considering the knowledge, skill,
17 experience, training or education of the witness,
18 the reasons the witness gave for the opinion
19 expressed, and all the other evidence in the case.

20 You are instructed that The American
21 Tobacco Company merged with the defendant Brown &
22 Williamson Tobacco Corporation and that, as a result
23 of the merger, Brown & Williamson Tobacco
24 Corporation has succeeded to the liabilities of The
25 American Tobacco Company.

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1 Plaintiffs Grady and Mildred Carter have
2 raised claims against Brown & Williamson Tobacco
3 Corporation, as successor by merger to The American
4 Tobacco Company, based on the injuries Mr. Carter
5 allegedly sustained as a result of smoking Lucky
6 Strike cigarettes, which were manufactured by The
7 American Tobacco Company. It is alleged that Grady
8 Carter smoked Lucky Strike cigarettes from 1947
9 through 1972 and other brands of cigarettes from
10 1972 through 1991

11 Plaintiffs Grady and Mildred Carter do not
12 raise claims based on the conduct of Brown &
13 Williamson Tobacco Corporation. Their claims are
14 solely based on the conduct of The American Tobacco
15 Corporation -- excuse me, Company -- prior to the
16 time it merged with Brown & Williamson Tobacco
17 Corporation in 1995.

18 In this action, plaintiffs Grady and
19 Mildred Carter are not seeking damages for Grady
20 Carter's smoking cigarettes after 1972.

21 The issues for your determination as to
22 Brown & Williamson Tobacco Corporation's statute of
23 limitations defense are whether the plaintiffs filed
24 their action within four years from the time the
25 facts giving rise to the cause of action were

1 discovered or should have been discovered with the
2 exercise of due diligence.

3 In determining this issue, you should
4 consider, one, whether plaintiff Grady Carter had
5 both knowledge of the actual injury and knowledge
6 that there was a reasonable possibility that the
7 injury was caused by defendant and, two, whether
8 plaintiff Grady Carter brought the instant action
9 within four years of that time.

10 If the greater weight of the evidence
11 supports defendant Brown & Williamson Tobacco
12 Corporation, then your decision on this issue should
13 be for defendant Brown & Williamson Tobacco
14 Corporation; however, if the greater weight of the
15 evidence does not support the position of Brown &
16 Williamson Tobacco Corporation, then your decision
17 on this issue should be in favor of claimant Grady
18 Carter.

19 In your deliberations, you are to consider
20 two distinct claims. Plaintiffs Grady and Mildred
21 Carter allege, first, that defendant was negligent
22 in failing to warn Grady Carter of the known or
23 knowable dangers associated with smoking Lucky
24 Strike cigarettes and that such negligence was a
25 legal cause of loss, injury or damage sustained by

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1 plaintiffs Grady and Mildred Carter.

2 Second, plaintiffs Grady and Mildred
3 Carter also allege that Lucky Strike cigarettes,
4 manufactured and sold by The American Tobacco
5 Company, were defective when they left the
6 possession of The American Tobacco Company and that
7 such defect was a legal cause of loss, injury or
8 damage sustained by claimants Grady and Mildred
9 Carter.

10 Although these claims have been tried
11 together, each is separate from the other, and each
12 party is entitled to have you separately consider
13 each claim as it affects that party. Therefore, in
14 your deliberations, you should consider the evidence
15 as it relates to each claim separately, as you would
16 had each claim been tried before you separately.

17 The ultimate burden of persuasion in the
18 case submitted to the jury remains with the
19 plaintiffs.

20 The issues for your determination on the
21 negligence claims of Grady and Mildred Carter
22 against defendant are:

23 Whether defendant was negligent in failing
24 to warn Grady Carter of the known or knowable
25 dangers associated with smoking Lucky Strike

1 cigarettes and, if so, whether such negligence was a
2 legal cause of loss, injury or damage sustained by
3 plaintiffs Grady and Mildred Carter.

4 A product is defective if it is
5 unreasonably dangerous when placed in the hands of a
6 consumer without a warning. This does not mean that
7 to prevent a product from being deemed unreasonably
8 dangerous a warning must always be given. There is
9 a duty to warn only when the hazards associated with
10 the use of the product are not obvious, not
11 reasonably apparent, or not as well known to the
12 user as to the manufacturer.

13 A duty to warn attaches, not when
14 scientific certainty is established, but whenever a
15 reasonable man would want to be informed of the risk
16 in order to decide whether to expose himself to it.

17 In evaluating whether a manufacturer has a
18 duty to warn at any relevant time, you must consider
19 the knowledge of the medical and scientific
20 community at that time.

21 Negligence is the failure to use
22 reasonable care. Reasonable care is that degree of
23 care which a reasonably careful person would use
24 under like circumstances.

25 Negligence may consist either in doing

1 something that a reasonably careful person would not
2 do under like circumstances or in failing to do
3 something that a reasonably careful person would do
4 under like circumstances.

5 If the greater weight of the evidence does
6 not support the negligence claim of Grady and
7 Mildred Carter, then your verdict on the negligence
8 claim should be for the defendant.

9 If, however, the greater weight of the
10 evidence does support the negligence claim of
11 plaintiffs Grady and Mildred Carter, then your
12 verdict should be for plaintiffs in the total amount
13 of their damages

14 Greater weight of the evidence means the
15 more persuasive and convincing force and effect of
16 the entire evidence in the case.

17 Negligence is a legal cause of injury if
18 it directly and in natural and continuous sequence
19 produces or contributes substantially to producing
20 such injury, so that it can reasonably be said that,
21 but for the negligence, the injury would not have
22 occurred.

23 In order to be regarded as a legal cause
24 of loss, injury or damage, negligence need not be
25 the only cause. Negligence may be a legal cause of

1 loss, injury, or damage even though it operates in
2 combination with the act of another or some other
3 cause if such other cause occurs at the same time as
4 the negligence and if the negligence contributes
5 substantially to producing such loss, injury or
6 damage.

7 A manufacturer and supplier of a product
8 who knows or has reason to know that the product is
9 likely to be dangerous in normal use has a duty to
10 warn those who may not fully appreciate the
11 possibility of such danger The warning should be
12 of such intensity as to cause a reasonable man to
13 exercise for his own safety caution commensurate
14 with the potential danger

15 Since January 1, 1966, federal law has
16 required specific warnings to appear on packages of
17 cigarettes sold in the United States. There is no
18 claim in this case that The American Tobacco
19 Company's cigarettes were not labeled in accordance
20 with the statute.

21 The federal law does not limit the
22 liability of the defendant against the claim of a
23 failure to warn before July 1, 1969. However, you
24 may not base any finding of liability on a
25 determination that after July 1, 1969, the defendant

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1 should have included additional or more clearly
2 stated warnings in the advertising or promotion of
3 its cigarettes or that the defendant, through its
4 advertising or promotional practices, neutralized,
5 minimized or undermined the effect of the federally
6 mandated warnings during that time.

7 The federal law does not limit the
8 liability of the defendant against claims that its
9 products were defective and unreasonably dangerous
10 in their design.

11 The issues for your determination on the
12 claim of plaintiffs Grady and Mildred Carter against
13 defendant are whether the Lucky Strike cigarettes
14 manufactured and sold by The American Tobacco
15 Company were defective when they left the possession
16 of The American Tobacco Company and, if so, whether
17 such defect was a legal cause of loss, injury or
18 damage sustained by plaintiffs Grady and Mildred
19 Carter.

20 A product is defective if it is
21 unreasonably dangerous and placed in the hands of a
22 consumer without a warning. This does not mean that
23 to prevent a product from being deemed unreasonably
24 dangerous a warning must always be given. There is
25 a duty to warn only when the hazards associated with

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1 the use of the product are not obvious, not
2 reasonably apparent, or not as well known to the
3 user as the manufacturer.

4 A product is also unreasonably dangerous
5 because of its design if the risk of danger in the
6 design outweighs the benefits.

7 In determining whether the risk of danger
8 in the design outweighs the benefits of Lucky Strike
9 cigarettes, you must determine, one, whether the
10 alleged injuries plaintiff Grady Carter sustained as
11 a result of the challenged design for Lucky Strike
12 cigarettes would have been avoided, or less severe,
13 had The American Tobacco Company used a feasible and
14 available alternative design and, two, whether the
15 enhanced danger posed by the challenged design
16 outweighed the added cost, if any, to The American
17 Tobacco Company and, three, whether plaintiff Grady
18 Carter would have used the product employing the
19 alternative design instead of the Lucky Strike
20 cigarettes that he did smoke and that if he had used
21 the product with this alternative design his
22 injuries would have been avoided.

23 In determining whether the cost of the
24 alternative design was outweighed by the danger
25 posed by the design actually used by The American

1 Tobacco Company in manufacturing Lucky Strike
2 cigarettes, you must consider the following
3 factors.

4 No. 1, the usefulness and desirability of
5 the product; No. 2, the availability of other and
6 safer products to meet the same need; No. 3, the
7 likelihood of injury and its probable seriousness;
8 No. 4, the obviousness of the danger; No. 5, common
9 knowledge and normal public expectation of the
10 danger, particularly for established products;
11 No. 6, the avoidability of injury by care in use of
12 the product, including the effect of instructions or
13 warnings; and, No. 7, the ability to eliminate the
14 danger without seriously impairing the usefulness of
15 the product or making it unduly expensive.

16 A manufacturer has the duty to possess
17 expert knowledge in the field of its products.

18 Moreover, a manufacturer bears the duty to
19 fully test its products before its products are
20 sold.

21 In evaluating the reasonableness of the
22 conduct of defendant at any relevant time, you must
23 consider the knowledge of the medical and scientific
24 community at that time.

25 If the greater weight of the evidence does

1 not support the defective product claims of Grady
2 Carter and Mildred Carter, then your verdict on the
3 defective product claims should be for the
4 defendant. If, however, the greater weight of the
5 evidence does support the defective product claims
6 of plaintiffs Grady and Mildred Carter, then your
7 verdict should be for plaintiffs in the total amount
8 of their damages.

9 Greater weight of the evidence means the
10 more persuasive and convincing force and effect of
11 the entire evidence in the case.

12 A defect is a -- in a product is a legal
13 cause of injury if it directly and in natural and
14 continuous sequence produces or contributes
15 substantially to producing such injury, so that it
16 can be reasonably said that, but for the defect, the
17 injury would not have occurred.

18 In order to be regarded as a legal cause
19 of loss, injury or damage, the defect need not be
20 the only cause. A defect may be a legal cause of
21 loss, injury or damage even though it operates in
22 combination with the act of another or some other
23 cause if such other cause occurs at the same time
24 the defect had its effect and if the defect
25 contributes substantially to producing such loss,

1 injury or damage.

2 If your verdict is for the defendant, you
3 will not consider the matter of damages. But if you
4 find for plaintiffs Grady and Mildred Carter, you
5 should award Grady and Mildred Carter an amount of
6 money that the greater weight of the evidence shows
7 will fairly and adequately compensate them for such
8 damage, loss or injury which they sustained as a
9 result of the actions of the defendant, including
10 any such damage as Grady and Mildred Carter are
11 reasonably certain to experience in the future.

12 You should consider the following
13 elements:

14 One, any bodily injury sustained by Grady
15 Carter and resulting pain and suffering, disability
16 or physical impairment, disfigurement, mental
17 anguish, inconvenience, loss of capacity for the
18 enjoyment of life experienced in the past or to be
19 experienced in the future and, two, any loss by
20 Mildred Carter of the services, comfort, society and
21 attentions of Grady Carter in the past and in the
22 future, by reason of her husband's injury. There is
23 no exact standard for measuring either damage. The
24 amount should be fair and just in light of the
25 evidence.

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1 If the greater weight of the evidence
2 shows that Grady Carter has been permanently
3 injured, you may consider his life expectancy. The
4 mortality tables received in evidence may be
5 considered in determining how long Grady Carter may
6 be expected to live. Such tables are not binding on
7 you but may be considered together with other
8 evidence in the case bearing on Grady Carter's
9 health, age and physical condition, before and after
10 the injury, in determining the probable length of
11 his life.

12 Your verdict must be based on the evidence
13 that has been received and the law on which I have
14 instructed you. In reaching your verdict, you are
15 not to be swayed from the performance of your duty
16 due to prejudice, sympathy or any other sentiment
17 for or against Grady Carter.

18 During the course of the trial, you may
19 have taken notes with regard to the evidence
20 presented. While you may refer to your notes, your
21 notes are not to be considered as evidence in the
22 case, and no one juror's notes should be given any
23 greater weight than the notes of any other juror.

24 When you retire to the jury room, you
25 should select one of your members to act as foreman

1 or forewoman to preside over your deliberations and
2 sign your verdict. Your verdict must be unanimous,
3 that is, your verdict must be agreed by each of
4 you.

5 You have been given a verdict form with
6 five questions. I previously read it to you.

7 When you have agreed on your verdict, the
8 foreman or forewoman, acting for the jury, should
9 date and sign the appropriate form of verdict.

10 Let me see counsel at side bar.

11 (Side-bar conference held outside the
12 hearing of the jury)

13 THE COURT: Other than previously stated,
14 are there objections to the Court's reading of the
15 instructions?

16 MR. MAXWELL: No objections, Your Honor,
17 from the plaintiffs.

18 MR. PRICHARD: None by defendant, Your
19 Honor.

20 THE COURT: All right, thank you.

21 (Side-bar conference concluded;
22 proceedings resumed before the jury)

23 THE COURT: Lady and gentlemen, you may
24 now retire to consider the verdict.

25 (Jury retires for deliberations at

1 10:10 a.m.)

2 THE COURT: Please be seated.

3 Anything else to bring up?

4 MR. MAXWELL: Nothing from the plaintiffs,
5 Your Honor.

6 MR. PRICHARD: Not at this time, Your
7 Honor.

8 THE COURT: Very good. We will stand in
9 recess until the jury reaches its verdict.

10 THE BAILIFF: All rise. This court is
11 recessed for deliberations.

12 (Change of reporters)

13 (Court in recess, 10:10 a.m.-12:10 p.m.)

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ACCURATE REPORTING SERVICE OF JACKSONVILLE, INC.

1 Friday, August 9, 1996

12:10 p.m.

2 THE COURT: Gentlemen, I have a note here
3 that I've written and dated: If you're interested
4 in lunch, the options are, one, place an order to be
5 delivered to the jury room or, two, be accompanied
6 by the bailiff outside of the jury room as a group
7 to some eating establishment. Which do you prefer?

8 MR. MAXWELL: No objection from the
9 plaintiff, Your Honor

10 MR. PRICHARD: That's fine, Your Honor.

11 (Discussion off record)

12 THE COURT: If they choose the latter
13 option to be accompanied outside of the jury room to
14 eat, do you have suggestions as to how we might
15 achieve that?

16 MR. MAXWELL: Financially or logistically?

17 THE COURT: Both.

18 MR. MAXWELL: I'd better call my office
19 and get some cash.

20 MR. PRICHARD: May we approach, Your
21 Honor?

22 THE COURT: Yes, sir.

23 MR. PRICHARD: Thank you.

24 (Side-bar conference held)

25 THE COURT: Logistically and costwise if

1 they decide to go somewhere?

2 MR. SHEFFLER In either event, I think
3 the parties will share the cost.

4 MR. MAXWELL: Certainly.

5 THE COURT: And if they don't -- I guess
6 right across the street would be simple enough. If
7 they wanted to do that, Mr. Forte could just walk
8 across the street with them. But do you want to
9 limit them to that option?

10 MR. MAXWELL: Well, I guess -- wherever
11 they go they have to have some place close

12 MR. PRICHARD: Sure

13 THE COURT: That does limit it if you-all
14 hadn't planned for them to go anywhere other than
15 walking distance.

16 MR. MAXWELL: I think they should remain
17 together with the bailiff, of course.

18 THE COURT: In walking distance there is
19 the Blackstone Grill, Desert Rider -- is that it?

20 MR. PRICHARD: That's about it.

21 (Discussion off record)

22 MR. PRICHARD: It seems to me like I would
23 really just indicate to them that the bailiff would
24 accompany them on a walking excursion to a nearby
25 restaurant --

1 THE COURT: Wherever the choose.

2 MR. PRICHARD: -- and they can decide.

3 THE COURT: Okay. That's fine.

4 MR. PRICHARD: Hopefully they'll want
5 lunch brought in so they can continue to work.

6 THE COURT: I agree.

7 MR. PRICHARD: They may want to stretch
8 their legs.

9 THE COURT: Hopefully when they buzz
10 they'll have a verdict and not a lunch order.

11 You're not optimistic?

12 MR. PRICHARD: They might.

13 THE COURT Okay. We'll wait to see how
14 long they take to decide about eating.

15 (Side-bar conference concluded)

16 (Discussion off record)

17 THE COURT: Okay. This needs to be a
18 Court's Exhibit 3, signed response: Option one,
19 please, Sam Gaskins, foreman.

20 (Court's Exhibit No. 3 was received into
21 evidence.)

22 THE COURT: Okay. Do you have your
23 menus?

24 MR. PRICHARD: I left them with the
25 bailiff last night.

1 THE BAILIFF: The menus? They're right
2 there in front of you.

3 MR. PRICHARD: That's the only menu I
4 have; is that okay?

5 THE COURT: What was the question,
6 Mr Prichard?

7 MR. PRICHARD: The only menu we have is the
8 one from the Steak -- whatever it's called.

9 THE BAILIFF: That's the only delivery. I
10 have one here that --

11 THE COURT: This can be off the record.

12 (Discussion off record)

13 THE COURT: Send them back Tell them to
14 make their choices and buzz us when they've
15 completed them all Thank you

16 (Court in recess, 12:21 - 3:25 p.m.)

17 THE BAILIFF: All rise. This court is
18 again in session. Be seated, please.

19 (Jury absent)

20 THE COURT: Good afternoon.

21 Let me see counsel at side bar for just a
22 minute.

23 (Side-bar conference held, court and
24 counsel)

25 THE COURT: All right. Mr. Forte, would

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1 you bring the jury in, please.

2 (Jury present at 3:28 p.m.)

3 THE COURT: Please be seated. Lady and
4 gentlemen of the jury, I understand you have reached
5 your verdict. Is that right, Mr. Gaskins?

6 JUROR Yes, sir.

7 THE COURT: Would you tender the verdict
8 to Mr. Forte, our bailiff, please

9 JUROR: (Tenders document)

10 THE COURT: All right. The verdict
11 appears to be in proper form. Mr. Hyatt, would you
12 publish the verdict, please.

13 THE CLERK: Yes, Your Honor.

14 Lady and gentlemen of the jury, please
15 rise and harken to your verdict.

16 In the Circuit Court, Fourth Judicial
17 Circuit, in and for Duval County, Florida, Case
18 No. 95-00934-CA, Division CV-B, in the case of Grady
19 Carter and Mildred Carter, his wife, plaintiffs,
20 versus Brown & Williamson Tobacco Corporation, as
21 successor by merger to The American Tobacco Company,
22 defendants.

23 We the jury return the following verdict:

24 Number one: Was there negligence on the
25 part of defendant Brown & Williamson Tobacco

1 Corporation, as successor by merger to The American
2 Tobacco Company, which was a legal cause of loss,
3 injury or damage to plaintiffs Grady and Mildred
4 Carter?

5 Answer: Yes

6 Number two: Were the Lucky Strike
7 cigarettes manufactured by defendant Brown &
8 Williamson Tobacco Corporation, as successor by
9 merger to The American Tobacco Company, unreasonably
10 dangerous and defective and a legal cause of loss,
11 injury or damage to plaintiffs Grady and Mildred
12 Carter?

13 Answer: Yes

14 Number three Is the plaintiffs' cause
15 of action barred by the four-year statute of
16 limitations?

17 Answer: No.

18 Number four: What is the amount of
19 damages sustained by plaintiff Grady Carter for pain
20 and suffering, mental anguish and loss of capacity
21 for the enjoyment of life?

22 A, in the past, \$300,000; B, in the
23 future, \$200,000.

24 Five: What is the amount of damages
25 sustained by plaintiff Mildred Carter for mental

1 anguish, loss of her husband's services, comfort,
2 society and attentions?

3 A, in the past, \$175,000; B, in the
4 future, \$75,000

5 So say we all this 9th day of August 1996,
6 Samuel B Gaskins III, foreperson.

7 THE COURT: Thank you, lady and
8 gentlemen. Please be seated.

9 Do either of the parties wish to have the
10 juries polled?

11 MR. MAXWELL: No, Your Honor.

12 MR PRICHARD We would, Your Honor.

13 THE COURT: All right. If you would,
14 Mr. Hyatt, poll the jury.

15 THE CLERK: June B. King, is this your
16 verdict?

17 JUROR: Yes.

18 THE CLERK: Richard B. Prisock, is this
19 your verdict?

20 JUROR Yes.

21 THE CLERK: Ronnie L. Fulgham, is this
22 your verdict?

23 JUROR: Yes.

24 THE CLERK: Samuel B. Gaskins III, is this
25 your verdict?

1 JUROR: Yes.

2 THE CLERK: David E. Marsh, is this your
3 verdict?

4 JUROR: Yes.

5 THE CLERK: Christopher Ray, is this your
6 verdict?

7 JUROR: Yes.

8 THE COURT: Thank you, Mr. Hyatt.

9 Lady and gentlemen, it has been three
10 weeks ago since we gathered in this courtroom to
11 consider the case of Grady Carter and Mildred Carter
12 versus Brown & Williamson Tobacco Corporation, as
13 successor by merger to The American Tobacco
14 Company.

15 I estimated at the beginning of the trial
16 that it would take two weeks. It actually took a
17 week longer, and I know that it has been a
18 tremendous inconvenience to you and disruption to
19 your personal lives, your livelihoods. And I want
20 to take this opportunity on behalf of the Fourth
21 Judicial Circuit, the people of the State of
22 Florida, the parties to this case to sincerely thank
23 you for the time and attention that you've given to
24 this matter and to the performance of your duties as
25 citizens of this state.

1 It has been by this system for hundreds of
2 years that we have resolved disputes between our
3 citizens. Without your involvement in this process
4 we could not have performed the service that we all
5 have to perform in assuring that our society remains
6 free and that disputes are resolved peacefully and
7 civilly as they are in courts of law.

8 I have to advise you of some very special
9 privileges that you have as jurors. Your
10 deliberations have been recognized, as have all
11 jurors' deliberations, to be private. You can not
12 be compelled to discuss your deliberations with
13 anyone. However, you do have the right to discuss
14 them with anyone that you choose.

15 It is entirely up to you whether or not
16 you discuss your deliberations, the decision-making,
17 your verdict or any other matters concerning this
18 trial with anyone else. You are at liberty to,
19 unlike your posture before you reached your verdict,
20 and I urge you to use your best judgment in making
21 the decision as to whether you should share the
22 process with others or not.

23 I need to collect your notebooks. Are
24 they in the jury room?

25 Do you-all have personal belongings in the

1 jury room?

2 Very good Is there anything else that
3 the parties need to take up with Court at this time?

4 MR. MAXWELL: No, Your Honor.

5 MR. PRICHARD: Not at this time, Your
6 Honor.

7 THE COURT: Mr. Hyatt?

8 THE CLERK: These are for the jurors for
9 their service.

10 THE COURT. Very good. Mr. Forte, you if
11 would tender those to the jurors.

12 (Bailiff tenders documents to jurors)

13 THE COURT: Again, thank you very much,
14 lady and gentlemen. You can collect your belongings
15 out of the jury room, and we stand adjourned.

16 THE BAILIFF: All rise. This court is
17 adjourned.

18 (The proceedings were concluded at
19 3:35 p.m.)

20 - - -

21 (Side-bar conference held)

22 THE COURT: What do you-all wish to
23 withdraw?

24 MR. PRICHARD: Your Honor, defendant would
25 like permission of the Court to withdraw two of the

1 original exhibits that were filed, Defendant's
2 Exhibit 6, the book Tobacco and Health, and
3 Defendant's Exhibit 17, which was the Symptoms book
4 we checked out from the public library

5 We would like to substitute, with the
6 Court's permission, a photocopy of Defendant's 6 for
7 the record, and we'll bring a copy of the Symptoms
8 book and have it filed --

9 THE COURT: Substitute it.

10 MR. PRICHARD: Substitute it for the
11 original.

12 THE COURT: All right Let me just make
13 sure. Is the Symptoms book edition and date --

14 MR. PRICHARD. On the record?

15 THE COURT: -- on the record so that we
16 can assure --

17 MR. PRICHARD: Sure, Your Honor. It's
18 called Symptoms The Complete Home Medical
19 Encyclopedia, copyright 1976, and the author is
20 Sigmund Stephen Miller.

21 MR. MAXWELL: Your Honor, on behalf of the
22 of plaintiffs, we would like to withdraw what has
23 been filed in evidence as Plaintiffs' Exhibit
24 No 29, and we will substitute a copy. It's a
25 video. We will substitute a copy of the videotape

1 on Monday.

2 MR. WILNER: And our cigarettes, the
3 Australian cigarettes, we'll photocopy those.

4 MR. PRICHARD: Is that the Flintstones
5 tape?

6 MR. MAXWELL: Yes. This is the
7 Flintstones videotape and the other exhibit is
8 Plaintiff's Exhibit No 28, which was the exemplars
9 of the cigarette packs. We will photocopy both
10 sides of those and substitute those in the record
11 and we'll do that on Monday, as well.

12 MR. PRICHARD That's fine with us, Your
13 Honor.

14 THE COURT: Very good.

15 MR. PRICHARD Thank you, Your Honor.

16 MR. MAXWELL. Thank you.

17 (The proceedings were concluded at
18 3:50 p.m.)

19 - - -
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25

COURT CERTIFICATE

STATE OF FLORIDA)
)
COUNTY OF DUVAL)

The following individually named reporters certify that we were authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of our stenographic notes.

We further certify the original transcript herein will be delivered to J. W. Prichard, Jr., Esq., attorney for defendant, for filing with the court or his safekeeping

DATED this 9th day of August 1996.

(Pages 4170 through 4221)
Pamela Chafin Roach, RPR

(Pages 4222 through 4234)
F Darlene Ricketson

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**CERTIFIED
COPY**

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

CASE NO 95-00934-CA

DIVISION CV-B

GRADY CARTER and
MILDRED CARTER,

Plaintiffs,

vs

BROWN & WILLIAMSON TOBACCO
CORPORATION, as successor by
merger to THE AMERICAN TOBACCO
COMPANY,

Defendant.

PROCEEDINGS held before The Honorable
Brian J. Davis, pursuant to Notice of Hearing, in
Courtroom 1-A, at the Duval County Courthouse, 330
East Bay Street, Jacksonville, Florida, on Tuesday,
October 29, 1996, at 1:10 p m., before Connie Jo
Ramirez, Registered Professional Reporter, and Notary
Public in and for the State of Florida at Large.

- - -

A P P E A R A N C E S

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PRESENT: Rebecca Feyerick

- - -

P R O C E E D I N G S

Tuesday, October 29, 1996

1.10 p.m.

- - -

THE COURT: Good afternoon Tell me what we have calendered I notice some motions concerning fees and costs that were calendered and maybe recalendered.

MR WILNER: Your Honor, I think all we have today, and I think it's been rescheduled for only an hour and a half with Your Honor, are post trial motions filed by the defendant Brown & Williamson

The plaintiffs' petition for fees and costs was originally scheduled for this hour but was rescheduled because of our need to obtain information from attorneys giving affidavits and things that was not available in time

THE COURT: All right.

MR. WILNER So we asked that that be rescheduled, and I think there was originally four hours set aside for all of these, I believe that that was reduced down to an hour and half for the post trial motions which I think are the only thing.

THE COURT. Very good. Mr Riley, are you going to argue the motions for the defendant?

MR. RILEY Yes, Your Honor.

1 THE COURT: Very good, I'll hear from you.

2 MR RILEY: Thank you Your Honor,
3 initially I would note that the basis and the grounds
4 for the motion are all set forth, of course, in the
5 motion itself and some of those grounds are also
6 expanded upon and discussed in the memoranda of law
7 that we filed today.

8 I may not and in fact I doubt that I will
9 address all of them in my presentation this afternoon
10 but I would just point out that we are not waiving any
11 arguments, obviously, they're all in the papers and I
12 would defer you to the papers for a complete
13 recitation on the grounds of the motion

14 THE COURT. All right, thank you

15 MR RILEY Also as a housekeeping matter,
16 and I don't think it's necessary but just in case Your
17 Honor thinks that it is, we did file an affidavit from
18 Dr. Thompson who, as you recall, was our expert
19 psychiatrist from New Orleans who testified at trial
20 about the issue of addiction

21 We filed an affidavit from Dr Thompson last
22 week which addresses some of the matters that we would
23 have liked to be able to present at the trial of the
24 case had we been given the opportunity to do that

25 I don't think it's necessary, Your Honor,

1 for us to amend the motion for new trial because
2 Dr Thompson's affidavit really does not state new
3 grounds for the motion It merely illustrates the
4 prejudice that we think was suffered as a result of
5 the notice issues and the way the documents arose

6 So I don't think it's necessary for us to
7 file a motion to amend the motion for new trial;
8 however, in case Your Honor thinks that it is, I would
9 make a motion or a tenens motion to amend the motion
10 for new trial in order to incorporate Dr Thompson's
11 affidavit

12 THE COURT Mr Wilner?

13 MR. WILNER: No, we don't have -- we
14 don't object, let him incorporate whatever he wants at
15 this point

16 THE COURT: All right.

17 MR. RILEY: Your Honor, I have prepared an
18 order granting the motion.

19 THE COURT: All right. Would you tender it
20 to Ms. Feyerick, please, very good.

21 MR. RILEY Thank you, Your Honor.

22 THE COURT: You're welcome.

23 MR. RILEY Your Honor, the complaint in
24 this case asserted two causes of action against The
25 American Tobacco Company; a claim for negligence and a

1 claim for strict liability There's never been any
2 claim made for fraud, there was never any claim made
3 in this case with respect to conduct of Brown &
4 Williamson Tobacco Corporation

5 American Tobacco, as you know, was merged
6 into Brown & Williamson Tobacco Corporation in early
7 1995, that was four years after Mr. Carter had stopped
8 smoking cigarettes

9 At all times pertinent to the lawsuit, Your
10 Honor, American Tobacco Company and Brown & Williamson
11 Tobacco Corporation were separate corporate entities,
12 in fact, they were rivals, they were competitors in
13 the cigarette business There was no connection
14 between them, entirely separate companies, competitors
15 and rivals, and that's the situation it was at all
16 times relevant to the lawsuit There was no corporate
17 affiliation between the two entities

18 The only reason that Brown & Williamson
19 became a defendant in this case was that in 1994, they
20 purchased American Tobacco, and then in early 1995,
21 the two corporations were merged

22 The complaint, the caption of the complaint,
23 the action was amended to reflect that merger and
24 Brown & Williamson was named as a defendant as
25 successor by merger to The American Tobacco Company.

1 It wasn't brought into the case because of
2 anything it did or didn't do, it wasn't brought into
3 the case because anyone claimed that the cigarettes it
4 made were defective or unreasonably dangerous, it
5 wasn't brought into the case because anybody claimed
6 that Brown & Williamson was negligent

7 Substantively the claims in the case after
8 Brown & Williamson was brought in as defendant or was
9 substituted in effect, remained exactly the same as
10 they were before

11 And the liability of Brown & Williamson in
12 this case did not turn on anything it did or anything
13 it didn't do. It turned solely on whether American
14 Tobacco Company was liable under the strict liability
15 or whether American Tobacco Company was negligent and
16 whether American's conduct was a cause of Mr. Carter's
17 injuries.

18 Nevertheless, Your Honor, the Brown &
19 Williamson documents, which you've heard so much
20 about, became the focus of this trial. And, in
21 particular, Your Honor, Brown & Williamson's decision
22 not to submit research into nicotine pharmacology, the
23 HIPPO research, so-called HIPPO research, that became
24 a key issue in the case, the case became a trial about
25 that research. It was really focused on quite

1 extensively throughout the course of the trial.

2 And in particular, especially in connection
3 with the crime fraud issue and assertions of privilege
4 as to the documents that were introduced, the issue
5 arose whether there was a crime or a fraud committed
6 in connection with the decision not to submit that
7 material to the Surgeon General's advisory committee
8 back in 1963 And Brown & Williamson's decision not
9 to submit that research was a focal point, indeed, I
10 believe the focal point at the trial.

11 Plaintiffs claimed that if this research had
12 been disclosed to the Surgeon General's advisory
13 committee, a series of things would have happened.

14 They claim, number one, that the Surgeon
15 General's advisory committee would have reached a
16 different conclusion than it did reach about whether
17 nicotine was addictive.

18 They claim, number two, that if the advisory
19 committee had reached a different decision, Congress,
20 when it passed the labeling statute, would have
21 required a different warning.

22 And they claim, number three, that if a
23 different warning was adopted then there would --
24 then a public health disaster would have been avoided;
25 that in essence became their claim

1 I submit, Your Honor, that the issues that
2 were presented in that claim and in particular the
3 issues that were presented in connection with the
4 crime fraud issue were very different from the issues
5 that were pled in the complaint

6 The issue of whether there was a fraud on
7 the Surgeon General or whether it was a crime not to
8 submit this research to the advisory committee
9 involved very specific issues

10 It involved questions like, well, what did
11 the Surgeon General's advisory committee ask for?
12 What did it ask Brown & Williamson to provide? What
13 did Brown & Williamson say in response? What else did
14 the advisory committee have available to it? What
15 information was in the public literature that it had
16 access to? And, specifically, what other research
17 into nicotine was cited to the committee in the course
18 of the preparation of the report?

19 And, finally, was the HIPPO research and the
20 failure to disclose that research, was it material in
21 some way? Did the failure to submit this research
22 result in a different conclusion? Would it have
23 changed the results?

24 Your Honor, the effect of admitting the
25 HIPPO research into evidence and in fact of

1 attributing it to Brown & Williamson, and in fact
2 plaintiff was able to, over objection, characterize
3 that research as a -- the failure to disclose that was
4 said to be unethical It was improper. Unethical is
5 the word they used I think they also said it was
6 conspiratorial

7 But the effect of that was to transform the
8 trial into consideration of Brown & Williamson's
9 conduct and whether Brown & Williamson did something
10 wrong or not

11 The plaintiffs stress that these documents
12 were secret, that they had remained secret until 1995

13 They claim that a public health disaster
14 arose as a result in the failure to disclose this
15 research and they blame that public health disaster on
16 Brown & Williamson.

17 Your Honor did charge the jury that
18 Brown & Williamson's liability in this case depended
19 on the conduct of American Tobacco Company I don't
20 think that cured the basic difficulty that was
21 presented in the trial, though, for a number of
22 reasons, which I'll get into, but Your Honor had, at
23 that point, already denied our motion in limine to
24 preclude the documents as irrelevant.

25 Your Honor at that point had already

1 adjourned -- had denied our request to adjourn the
2 trial date in order to prepare -- to allow us time to
3 prepare a defense to these new claims and allegations

4 Your Honor at that point had already
5 overruled or refused our request to redact the
6 documents so that they would not be identified as
7 Brown & Williamson documents.

8 We made that request in order to prevent
9 undue prejudice, to prevent the jury from judging
10 Brown & -- from assessing liability on something Brown
11 & Williamson did or didn't do, not on something
12 American Tobacco Company did or didn't do

13 Your Honor had also overruled our objections
14 to Dr Feingold's testimony about the effect that this
15 would have had on the Surgeon General's advisory
16 committee, on Congress And we objected on the
17 grounds that that testimony was all speculative and
18 Your Honor had already overruled those objections

19 Your Honor, I believe that the result of
20 that was that the jury was invited to assess liability
21 based on what Brown & Williamson did or didn't do

22 And I think that Mr. Wilner, at various
23 points of the trial, contributed to and in fact
24 furthered that invitation and I'll just give you a few
25 examples here.

1 Page 352, in his opening statement,
2 Mr Wilner says, "We're charging that Brown &
3 Williamson was negligent." It wasn't the issue in the
4 case.

5 Page 358, he says -- he's talking about how
6 we prove our case that the Lucky Strikes cigarettes
7 caused Mr. Carter's cancer and that Brown & Williamson
8 was negligent and what to do about it

9 Same -- on page 360, he says one of the
10 issues is that Brown & Williamson was negligent, and,
11 two, did Brown & Williamson market a defective
12 product

13 Page 361, one of the issues that you'll be
14 asked to decide is, did anything that Brown &
15 Williamson do cause anything to happen to Mr Carter.

16 There are other instances in the course of
17 the trial but in his summation, Mr. Wilner says --
18 this is on page 3930 of the transcript -- you have
19 seen the evidence of what American Tobacco, Brown &
20 Williamson Tobacco and what they did in response; he's
21 talking about some medical evidence, what they did in
22 response to the medical evidence.

23 Page 3954, in fact, if American/Brown &
24 Williamson, whatever, had lived up to their corporate
25 responsibility, if they had followed the civil law

1 which we are the policemen of today and put a decent
2 warning, that they were obligated to do back then what
3 would have happened He's talking about Brown &
4 Williamson's conduct

5 On page 4086, he says, American, they can't
6 decide who to call themselves They are really Brown
7 & Williamson but they want to be American sometimes.

8 I think he's deliberately inviting the jury
9 to assess and evaluate Brown & Williamson's conduct.

10 And on page 4901, he says, are we in a
11 position to sit back here and excuse American Tobacco,
12 Brown & Williamson for getting away, for ignoring
13 their duty

14 Your Honor, I simply suggest to you that the
15 result of that was that Brown & Williamson's liability
16 was imposed. The jury inevitably was invited to
17 assess liability based on Brown & Williamson's conduct
18 which is improper.

19 Your Honor, I would also point out the
20 notice problem that was created when the plaintiffs
21 served a voluminous exhibit list shortly before trial.

22 The difficulty was -- there were a lot of
23 difficulties, as you well recall -- and in fact at the
24 time Your Honor specifically mentioned that you
25 were troubled by the lack of notice and volume of

1 exhibits that were listed by the plaintiffs

2 In fact, the late filing of those documents
3 and the volume of the exhibits were -- did in fact
4 pose problems for us in terms of preparing the case
5 for trial. Documents, for example, went back 30 or 40
6 years It's difficult for us to locate witnesses who
7 might even still be alive so we might be able to
8 address the plaintiffs' claim

9 The HIPPO research in particular wasn't even
10 conducted or sponsored by Brown & Williamson, it was
11 sponsored by an affiliated company, by researchers in
12 Switzerland

13 Witnesses who might have had knowledge, we
14 needed to identify them We needed to figure out what
15 their testimony might be We needed to be able to put
16 on proof of what that research meant and what it
17 didn't mean. And given the amount of time we were
18 given to do that, Your Honor, it couldn't be done.

19 Not only that, in essence, we were given a
20 list, initially, of thousands of documents This was
21 a Where's Waldo exhibit list. We weren't told which
22 documents were even going to be used.

23 THE COURT: Who's exhibit list?

24 MR RILEY: Where's Waldo, Your Honor

25 THE COURT. What is that?

1 MR. RILEY: It's a cartoon where you -- it's
2 a cartoon where -- it's a game my kids play and it's a
3 book, and you see all these people in the book that
4 look alike except there's one guy who's Waldo and
5 you've got to find Waldo

6 THE COURT I got you

7 MR. RILEY: Okay And that's what we were
8 confronted with

9 Now what would we have done if we had been
10 given notice, Your Honor? We would have done the
11 things that you normally do to defend a lawsuit
12 Figure out who the potential witnesses are Who were
13 the witnesses who could talk about this HIPPO
14 research Who were they? Where were they located?
15 What would their testimony be? We would have
16 developed expert testimony to talk about that
17 research.

18 We would have talked about other documents,
19 other literature, public literature, that would have
20 assessed that research and put it into context at the
21 time to show really whether it reflected the state of
22 the art or whether it didn't reflect the state of the
23 art. Because, Your Honor, we've been able to do that,
24 Dr. Thompson has done that, and I think Dr. Thompson
25 would be able to show, really, where that fits into

1 the research, and I'll explain Dr. Thompson's views in
2 a little bit

3 What Dr. Thompson has done is to review
4 documents from the national archives, Your Honor And
5 they're documents that were used in connection with
6 the preparation of the Surgeon General's report back
7 in 1962 and 1963.

8 Your Honor, you will recall, I'm sure, that
9 the HIPPO research dealt with the effect of nicotine
10 on the hypopituitary, the hypothalamicpituitary system
11 and what effects nicotine had on that system.

12 Dr Feingold testified at the trial that
13 this was really unique research, that it was far
14 advanced, that nobody else was doing similar research
15 Well, and that in fact the Surgeon General had no idea
16 that research like this even existed

17 Well, in fact, Your Honor, documents that
18 have come from the national archives show that in fact
19 the Surgeon General's advisory committee was well
20 aware of research like that and in fact research like
21 that was cited to the committee by the council for
22 tobacco research on behalf of Brown & Williamson and
23 American Tobacco Company The research wasn't
24 concealed; it was in fact disclosed The effects of
25 nicotine on the hypothalamicpituitary system were in

1 fact disclosed to the committee

2 And, in fact, Your Honor, there's two papers
3 that Dr Thompson found that were particularly
4 pertinent to the issues in this case They're
5 discussed in his affidavit

6 One, a paper by a researcher named Hockfelt
7 published in 1961, where Hockfelt writes, acute
8 smoking stimulates the pituitary adrenal cortical
9 system leading to increased cortisol production
10 That's just like the Batel research, Your Honor, and
11 that paper is a paper that was cited to the Surgeon
12 General's advisory committee by the council for
13 tobacco research on behalf of American and Brown &
14 Williamson.

15 Another paper that Dr. Thompson found
16 particularly pertinent among the papers that were
17 cited to the committee was a paper by Selvett,
18 Washington, Haag, also in 1961, and this paper cites
19 other research discussing the effects of nicotine for
20 smoking on the adrenal gland. And that paper says
21 that many of the effects of nicotine were said to be
22 due to quote an increased release of epinephrine also
23 called adrenaline induced by nicotine.

24 Again, research of the same type was
25 conducted by Batel in project HIPPO. So this research

1 was not hidden, research of this was not hidden, in
2 fact, it was disclosed, the attorney general's
3 advisory committee was well aware of these facts in
4 nicotine

5 Dr. Thompson has also, Your Honor, reviewed
6 dozens of papers dealing with nicotine and
7 pharmacology and what was known back in 1963 He's
8 now able to discuss at greater the lack of
9 significance of the HIPPO research at the time.

10 If he had been given the chance, he would
11 have been able to go through paper by paper, I think,
12 and show other studies which suggest the effects that
13 nicotine has on the hypothalamicpituitary system and
14 he could have done so by discussing particular studies
15 and by using the documents that come from the Surgeon
16 General's files themselves

17 More importantly, and in addition to that,
18 Your Honor, had we been given the opportunity, we
19 could have shown that the Batel research, the
20 conclusions which they reached based on this, they
21 concluded that nicotine was addictive based on this
22 research; that was the allegation that the plaintiffs
23 made.

24 We could have shown that that conclusion was
25 wrong because lots of other researchers looked at this

1 very same science, this very same literature, the very
2 same effects of nicotine, and concluded nevertheless
3 that nicotine was not addictive So we could have
4 shown that the HIPPO research did not in fact really
5 reflect the state of the art at the time, it did not
6 reflect proper characterization of nicotine or
7 smoking

8 Your Honor, I would suggest to you that --
9 and by the way, and I would also say Mr Yeaman, the
10 famous Yeaman memo, obviously relied on project HIPPO
11 when he wrote his 19- -- July 1963 memo, we would also
12 have shown, Your Honor, that because his memo was
13 based on flawed research, in fact, the conclusions
14 that he drew from that research were also flawed.

15 In fact, Your Honor, Dr Thompson talks in
16 his affidavit about numerous flaws in the research, in
17 fact, including improper techniques used, they didn't
18 use proper controls in the studies, they used the
19 wrong doses or -- it was questionable because the
20 doses that were used in the HIPPO research, whether
21 this had any significance to humans smoking

22 And I raise these as examples, Your Honor,
23 of the kinds of things that we would have done if we
24 had been given time and the opportunity to respond to
25 the plaintiffs' allegations with respect to project

1 HIPPO

2 There are other things that we could do We
3 could -- we might have been able to locate scientists
4 in the United Kingdom who were familiar with this
5 research and who could address it

6 We might have been able to come up with some
7 document experts who could explain what Edison Yeaman
8 was saying in his memo So there's a lot of things
9 that we could have done but we just never were given
10 the opportunity to do so

11 You can't prepare your case for trial and
12 try it at the same time, Your Honor, and that's the
13 position that we were put in because of the way the
14 exhibit list was sprung on us at the last minute

15 And, Your Honor, I would also like to
16 discuss the privilege and crime fraud issue.

17 Some of the documents, as you know, we claim
18 are privileged and attorney work product. The reason
19 of course for the crime fraud and, Your Honor, of
20 course at trial, ruled that even if the documents were
21 privileged or were attorney work product that they
22 were nevertheless admissible under the crime fraud
23 exception to the doctrine.

24 The reason for the crime fraud exception,
25 Your Honor, is very clear. Clients should not be

1 allowed to consult with attorneys in order to figure
2 out how to commit a crime or how to perpetrate a
3 fraud.

4 And if a client tries to do that, the
5 communication obviously is you're not seeking
6 professional advice, you're seeking advice for a
7 wrongful purpose and the privilege doesn't apply

8 Before invoking the crime fraud doctrine,
9 Your Honor, the Court must first hold a hearing The
10 plaintiff is required to submit proof to overcome the
11 privilege and the defendant is entitled to put on its
12 own proof

13 The reasons I've discussed, Your Honor, we
14 were not given an opportunity to do that. I don't
15 think it's a fair opportunity to have a hearing on
16 this issue in the midst of a trial, you try a case on
17 the one hand, and get ready for a hearing on the other
18 hand; I don't think that's appropriate. It wasn't a
19 -- we didn't have a reasonable opportunity to do that,
20 especially given the late disclosure by the plaintiffs
21 of their intent to rely on the HIPPO research.

22 I'd also point out, Your Honor, there's no
23 showing that this research was sought by Brown -- or,
24 I'm sorry, that the advice of lawyers was sought by
25 Brown & Williamson in order to perpetrate a fraud or

1 commit a crime.

2 I don't believe, Your Honor, the plaintiffs
3 have shown the failure to submit HIPPO to the Surgeon
4 General's committee was a crime or a fraud.

5 The reasons for not submitting the research
6 are explained in the appraisals of the research that
7 were written by a Dr Anna Darton and a professor
8 J. H Burns Those appraisals show that the research
9 contained many errors and was regarded as
10 inconclusive, it was regarded as flawed It was not fit
11 for publication

12 There's no evidence of any other reason why
13 Brown & Williamson did not submit that research to the
14 Surgeon General's committee, that's the only evidence
15 there is as to why they didn't do that because they
16 felt it was flawed, it was incomplete, it was
17 inconclusive, it was wrong, that's the only evidence
18 in the record.

19 Your Honor, even if the Court finds that a
20 crime of fraud was committed, that's still not enough
21 to invoke the crime fraud exception to attorney-client
22 privilege. You must still find, in order for the
23 exception to be applied, that the attorney was
24 consulted for the specific purpose of furthering the
25 crime or the fraud. It's a very specific focus.

1 The client must be engaged in a crime or a
2 fraud, he must be aware that the conduct was unlawful
3 He's got to go to the lawyer and seek the lawyer's
4 advice for the express purpose of committing the fraud
5 and the lawyer must give the advice in order to
6 further the fraud.

7 And here there's no showing that any lawyer
8 was consulted for the purpose of committing or
9 furthering a crime or fraud, Your Honor

10 And I'd like to talk in particular about
11 Mr Yeaman's memo Yeaman's memo, I would submit,
12 Your Honor, represents the antithesis of a crime or a
13 fraud.

14 Mr. Yeaman in his memo advocates issuing a
15 warning This is not a memo where Mr. Yeaman gives
16 advice to Brown & Williamson on how to defraud
17 anybody. This is a memo where Mr. Yeaman advocates
18 giving a warning.

19 The plaintiffs' claim in this case is that
20 Brown & Williamson was responsible for not doing what
21 Mr. Yeaman recommended. Mr Yeaman became the
22 yardstick by which Brown & Williamson was to be
23 judged, at least that's what plaintiffs claim.

24 Your Honor, that made Mr Yeaman a witness
25 against his own client. The whole reason that the

1 attorney-client privilege exists is to prevent that
2 from happening.

3 The lawyers must be free to give candid and
4 unfettered advice. If clients don't want to follow
5 that advice, that's the clients' business but you
6 don't then make the lawyer a witness against the
7 client, and that's why the privilege exists.

8 Your Honor, there are other bases for our
9 motion that are set out in the brief and in the motion
10 itself. You've heard argument about them before in
11 the past and I don't intend to belabor them.

12 One of the bases for the motion that we've
13 raised is that the plaintiffs violated the Dracket
14 rule. That inadmissible speculative testimony by
15 Mr. Carter was admitted into evidence. Testimony
16 about what could he have done if he had been warned,
17 we think that testimony was improper.

18 We also think that Dr. Feingold's testimony
19 about what effect this research would have had on the
20 advisory committee and on Congress and then on the
21 general public, we think that was highly speculative
22 and that testimony was inadmissible, also, Your Honor

23 We've also argued that the plaintiffs'
24 claims post 1969 for failure to warn were preempted
25 We've argued there's no duty to warn of risk of using

1 a product which are well known, that's based on
2 Section 402A of the restatement of torts

3 I would cite, Your Honor, and specifically
4 to judges -- judge's opinion in the Adam's case which
5 makes that very holding Florida law, Fifth Circuit,
6 has issued an opinion this year with respect to that
7 very same issue in the Algood case.

8 Your Honor, there are other grounds also
9 There's no proof of an alternative design to support
10 plaintiffs' design claim There's no proof that a
11 warning would have deterred Mr Carter from smoking

12 Plaintiffs' claims were barred by the statute
13 of limitations

14 Mrs Carter's claim for consortium was not
15 properly submitted to the jury

16 Your Honor, I don't intend to belabor those
17 points, I think you've heard our arguments in the
18 past.

19 If you do have questions about them, I would
20 be happy to respond to them but I don't intend to take
21 the Court's time up unnecessarily.

22 THE COURT All right, thank you, Mr Riley.
23 Your memo in support of your motion was submitted to
24 the Court today so I'm going to need some time to
25 scrutinize it Perhaps I'll have questions that will

1 be answered by it, I trust

2 MR RILEY: Thank you.

3 THE COURT You're welcome. Mr Wilner?

4 MR WILNER May it please the Court. I
5 likewise won't belabor matters which I feel have been
6 briefed at least three times, probably more, but only
7 to recollect as best I can and respond to the points
8 raised.

9 If I'm inadequate in responding, Your Honor,
10 I suggest only that the detailed memoranda was given
11 to us today, we've read it the best we can, do not
12 find anything really new in it but if I'm overlooking
13 something new, I would like the opportunity to spend
14 a few quiet hours and respond to anything that
15 actually is new

16 So far my cursory examination is that there
17 is nothing new in it and we would not need to respond
18 but we would like to make that decision tonight when
19 it's more quiet.

20 As I understand the arguments made, they are
21 that the defendant could have tried a different case
22 had circumstances been different, which I guess is the
23 argument that is made, that they were unprepared or
24 they should have been granted a continuance of this
25 trial.

1 I think these issues were briefed
2 extensively before Your Honor I would also say that
3 I am aware of no case, this included, that at the
4 conclusion of the case both litigants were not saying
5 that they would and could have tried different cases
6 had they had much more time I'm sure that's true
7 with any case.

8 I'm sure we would be delighted to continue
9 the discovery and preparation process forever, or at
10 least the defendants would be; we would not be, and
11 I'm sure that if that were continued, other witnesses,
12 other documents, God knows how much other stuff could
13 potentially be dug up, other experts and who knows
14 what but that isn't the test, whether more could have
15 been brought

16 The test is whether defendant obtained a
17 fair trial; not a perfect trial, but a fair trial, and
18 I believe that we exhaustively discussed these issues
19 including the Brown & Williamson documents, so let me
20 put some things in perspective.

21 The Brown & Williamson documents, of course,
22 were not authored by us. They were Brown &
23 Williamson's own documents They did -- they were
24 reticent in Brown & Williamson's files from the time
25 that they were produced by Brown -- or at the time

1 they were made, from the mid-'60s.

2 They were exposed to the world in April of
3 1994. They were published with detailed and --
4 detailed analysis in the Journal of the American
5 Association in July of 1995

6 Dr Feingold testified at length about that
7 report and the conclusions therein They were, in
8 particular, the Edison Yeaman memoranda which seems to
9 be the focus of some of counsel's comments The
10 Edison Yeaman memo bearing the date July 17, 1963, was
11 given to the defendants on April 15th, 1996, more than
12 three months prior to trial

13 In a request for admissions, we went over
14 and over these issues. We did not feel and do not
15 feel that Brown & Williamson can claim that it is
16 unaware of these documents which have been so public
17 and which have surfaced in this case

18 The fact that we originally filed a list
19 which included all of the public documents in an
20 effort to be complete does not detract from the fact
21 that we did give them timely notice of our intent to
22 use the Brown & Williamson, the key documents, the 20
23 or so that we ended up using, including especially the
24 Edison Yeaman memorandum.

25 And they certainly had plenty of time from

1 that time on to get Dr Thompson ready to testify
2 about this issue

3 On May 16th, they replied to this -- to our
4 request to admit the authenticity and agreed that this
5 document was authentic And on June 25th, they
6 deposed Dr. Feingold at length for several days during
7 which time he testified about this and any other Brown
8 & Williamson document that they chose to ask him
9 about, including the question of whether or not these
10 documents were forwarded and who got them and what the
11 reasons could be They had ample time to explore all
12 that

13 When Dr Thompson, their own expert was
14 deposed on July 1st, I asked him, have you seen
15 project HIPPO? Have you seen Brown & Williamson's own
16 documents, the people that hired you, and the -- and
17 the defense attorney instructed the witness not to
18 answer the question.

19 So rather than using that time to prepare,
20 Brown & Williamson was evidently playing or betting,
21 hoping that the documents would somehow not be
22 admissible against them.

23 And so they failed to take what time they
24 had, what ample time they had, to notify their
25 experts. And if they intended their experts to offer

1 opinions on these documents, to let us know or to go
2 to their experts and have them work on this project.

3 Evidently what they did is keep Dr Thompson
4 in the dark about the existence of these documents, as
5 least as far as we can tell, until about three days
6 before the trial. .

7 I think, as I recall the testimony,
8 Dr Thompson said that he had been first given these
9 in the hotel room while he was staying here in his
10 visit

11 Well, regardless, I was not able to ask him
12 even about these documents at his deposition and, in
13 fact, we asked Your Honor for some relief about that
14 because we didn't know what he had been given

15 And so as I recall now, and it's coming back
16 to me though I'm afraid it comes back in pieces these
17 days, is that we did convene a short deposition in the
18 courthouse for the limited purpose of ascertaining
19 whether Dr. Thompson had had access to these
20 documents, and when and whether he intended to offer
21 opinions. And he said he did and we discussed his
22 opinions And his opinions were just what we've heard
23 today; that the Batel research was flawed; that the
24 Surgeon General wouldn't have cared And that,
25 basically, you know, that this was much ado about

1 nothing.

2 And as I remember, Dr Thompson did testify
3 to those matters in trial He testified, I think,
4 although I don't have the transcript that he -- that
5 basically Edison Yeaman was wrong, the Batel studies
6 were wrong and so forth and so on. Basically the same
7 arguments that we're hearing here today.

8 And I think that presents a very tenable
9 jury argument on whether the documents are significant
10 or not, and to whom, and under what circumstances, and
11 whether or not the Surgeon General was interested or
12 wasn't, and whether or not the science was good

13 I think that's all perfectly legitimate jury
14 argument, which I believe I heard from the defendants,
15 that they argued to the jury, you know, that the HIPPO
16 studies or whatever were flawed, and I'll get back to
17 that.

18 But let me not forget that the defendant now
19 comes up and says the entire trial rested on project
20 HIPPO Ignoring all of the evidence that the jury was
21 entitled to use and did use against The American
22 Tobacco Company, the former, whatever you call it, for
23 Brown & Williamson. Now, I think -- well, let me
24 clear up some difficulty right from the start.

25 As I understand, the legal name for this

1 defendant is Brown & Williamson and I'm entitled to
2 address that that way in court and I did

3 When you merge with someone else you have to
4 bear the legal consequences of that merger and the
5 legal consequences are that you are now Brown &
6 Williamson, at least for the purposes of standing up
7 in court.

8 Now why does that matter? Well, that's your
9 name, number one, so I can't very well be challenged
10 for using the name, and in fact, many of those
11 references I said, American/Brown & Williamson,
12 whatever you want to call them; American didn't show
13 up on the verdict form so it's a confusion, Brown &
14 Williamson did.

15 But Your Honor did issue this instruction
16 that says it's the conduct of the prior corporation
17 American, and the jury is presumed to follow that and
18 that's fine, I have no problem with that

19 What was the conduct of the prior company
20 when it used to be a separate company? Well, they
21 heard the Robert Highman deposition at length where he
22 said the Surgeon General was dead wrong and took the
23 position that there was no connection between
24 cigarettes and cancer and other diseases and that
25 there was no need to warn.

1 They heard also the medical historical
2 evidence from Dr Feingold and others where for years
3 the proof of the connection of science -- of
4 cigarettes and disease had been made and Mr. Highman
5 apparently refused to believe it

6 They heard about the mouse painting studies
7 that had used Lucky Strikes cigarette tar and produced
8 cancers on the back of mice. And they heard that
9 American Tobacco had done nothing about that, in fact,
10 what they had done is publish newspaper and other
11 releases denying that there is anything to this
12 science calling it loose lips

13 Their own president, Paul Hahn, derided the
14 press for even reporting these kinds of important
15 scientific advances and refused to change, refused to
16 make any improvements in their Lucky Strikes
17 cigarettes

18 From that evidence alone, the jury could and
19 did conclude that Lucky Strikes cigarettes were
20 defective and that the defendant was negligent

21 Restricted to the activities of the
22 defendant American Tobacco Company, there was ample
23 evidence, I heard not a shred of challenge that the
24 jury had ample evidence to make that conclusion

25 So let's go back to this issue of Brown &

1 Williamson

2 At least one significance or at least one
3 reason that the Brown & Williamson documents are
4 directly admissible in this case is that the current
5 defendant, Brown & Williamson, took a present position
6 which was inconsistent with its prior stated position
7 in these documents

8 What were those present positions that Brown
9 & Williamson took at this trial which we were entitled
10 to use its prior documents to show that its present
11 position was disingenuous

12 Those were (a) the position that cigarettes
13 are not -- or nicotine is not addictive which is
14 contradicted in this document And (b) but ignored by
15 the defense in their -- in this particular argument,
16 is the admission that their cigarettes have what
17 Mr. Yeaman calls unattractive side effects Saying
18 they caused or predisposed to lung cancer They
19 contribute to certain cardiovascular disease and they
20 may well be truly causative in emphysema

21 Those statements of cause were direct
22 contradictions to what the defendant said at trial in
23 opening statement, through its witnesses, the
24 defendant said that there is no proof -- and in its
25 answers to interrogatories -- defendant said there's

1 no proof that cigarettes cause disease.

2 The jury was entitled to see that its own
3 executive vice president had, in 1963, concluded
4 otherwise For that reason alone, this document by
5 itself would be admissible. And that's not the only
6 reason its admissible It's also admissible because
7 in opening statement, attorney for defense relied on a
8 document called the 1964 Surgeon General's report, and
9 that document stated that cigarette -- that nicotine
10 was habituating but not addictive

11 And counsel for defense used a great deal of
12 charts, argument and discussion to try and show that
13 the 1964 Surgeon General report was really the one to
14 be believed and not the 1988 Surgeon General's report
15 That opened the door to any analysis that would
16 challenge or explain the basis for the conclusion of
17 the 1964 report.

18 And, in fact, the 1964 report mentioned in
19 it that there was a gap in knowledge about the
20 physiological effect of nicotine

21 Secondly, the -- or I should say, where did
22 this -- why was there such a gap in knowledge? Well,
23 the testimony showed that the Surgeon General had
24 requested from the various cigarette manufacturers the
25 conclusions of their research on various issues

1 including cancer and including the physiological
2 effect of nicotine.

3 The evidence also showed that what actually
4 happened was Brown & Williamson had the British
5 American Tobacco Company do certain research through
6 the Batel Institute which was a research firm which
7 came back with certain conclusions and those
8 conclusions were, in essence, that nicotine is
9 addictive And that was shown in one of the documents
10 called The Tentative Hypothesis of Nicotine Addiction

11 Well, for whatever -- for reasons that they
12 are -- I think are entitled to debate with the jury
13 those documents were not turned over to the Surgeon
14 General and it is not an absence of evidence because
15 if Your Honor will recall, there were a series of --
16 what's the word? A series of CABLES, all in caps,
17 that were exchanged, and in those CABLES, the --
18 Yeaman, who was in charge of this thing evidently,
19 stated that it is inadvisable to turn over this
20 material to the Surgeon General.

21 Now, one may, I guess, put whatever spin one
22 likes to on it and I think it is a valid jury argument
23 if the jury believes it, that in fact they were not
24 turned over because they were no good.

25 I believe that that is -- this is a jury

1 question why, the motives of Brown & Williamson in not
2 turning this over. But let me just say that the issue
3 of why -- of whether they were no good or not was
4 settled by their own executive vice president

5 In the memo that we have been discussing, he
6 says on page three or -- on page three he says, our
7 investigation -- and this is in the time period where
8 he has already received these research materials --
9 and then he says, our investigation definitely show
10 that both kinds of drugs -- and he goes into a
11 comparison of nicotine with rezerphine and some other
12 things, and then following that paragraph, still under
13 what our investigation definitely showed, he says,
14 moreover nicotine is addictive

15 Now I guess this is all jury argument and I
16 suppose that that's what we're doing now but maybe it
17 does have a connection.

18 So in any case, that long string of argument
19 was the second reason that any of these Brown &
20 Williamson documents were admissible and that is to
21 show the lack of basis or even the deception of the
22 1964 Surgeon General reports.

23 The third reason that they're admissible
24 -- and I'll get to the -- thanks, Greg -- and I'll get
25 to the objections in a minute, but the third reason,

1 and we think on the same lines -- thank you. The
2 third reason was that under the reasoning of the case
3 of Dartez, the asbestos case, Brown & Williamson
4 documents constitute a finding or a proof or at least
5 an argument of what the existing state of the art on
6 physiologic research into nicotine was.

7 In other words, the Dartez case holds that
8 even nonpublished material may be significant in
9 showing what a defendant had the obligation to
10 discover Just because it's -- in other words,
11 published material goes to the question of notice, but
12 even nonpublished material under Dartez may be
13 admissible and it -- and we argued this at trial so
14 this is kind of a repeat -- the reason it's admissible
15 is it shows what was available factually.

16 In other words, had the research been done,
17 this is at least according to expert testimony or
18 whatever, this would have been found.

19 So there are three reasons that Brown &
20 Williamson documents come into this case; to
21 contradict Brown & Williamson's present position, to
22 show the state of the art; and to show the 19- -- the
23 inadequacy or the reason that the 1964 Surgeon General
24 concluded as he did.

25 The latter, of course, was an issue that was

1 raised by the defendant in its opening so it was kind
2 of a response to that.

3 And if Your Honor recalls The American
4 Tobacco Company witness Sprinkle testified that ATC
5 had not done biologic testing on the physiology of
6 nicotine, Highman did the same thing, so these
7 documents would be evidence of what would be available
8 to those gentlemen had they made the first attempt to
9 actually find out

10 Now, having said that, that I think
11 established the prima -- established the relevance of
12 these documents, which is really what they're
13 complaining about, they're saying we're not Brown &
14 Williamson, why are they relevant? That establishes
15 the relevance

16 Before I move from there, let me say that
17 this entire issue of who is Brown & Williamson and who
18 is American Tobacco was hopelessly complicated when
19 the would be American Tobacco insisted on Brown &
20 Williamson's own privileges

21 In other words, if we are to take counsel's
22 statements that they are not Brown & Williamson to
23 heart, how could they have asserted an attorney-client
24 privilege?

25 They were wishing to act as if they were

1 Brown & Williamson for purposes of asserting the
2 privilege, but then they wish to retreat back to
3 American Tobacco for purposes of relevance

4 We argued in trial you can't have it both
5 ways Once you assert the privilege, you're acting as
6 Brown & Williamson. Once you -- if you wish to
7 withdraw the privilege and act as American Tobacco,
8 then I guess that would be another issue but they
9 injected themselves as Brown & Williamson into this
10 case by seizing the attorney-client privilege saying
11 that they were their documents and that they wish to
12 assert a privilege about them, that certainly means to
13 me that they were Brown & Williamson even if the
14 caption -- whatever the caption said, which I think
15 said Brown & Williamson

16 All right. So against that, we have -- and
17 this was all argued, Your Honor, and, in fact, I
18 couldn't carry it over because of the weight but I did
19 find it in the Court's file, our memorandum in
20 opposition to the defendants' motion to exclude the
21 Brown & Williamson documents, which is in the Court's
22 file, and I borrowed it just to have it in front of me
23 in case -- but it will go back in the Court's file

24 So as against that, then, what were the
25 objections to the document? Well, I've discussed

1 relevance so now let me discuss the privilege issue

2 There were two privileges raised kind of
3 randomly; one, was attorney-client, one was work
4 product

5 Now, if you'll recall, Your Honor, there
6 were, I think, 21, maybe 20 or 21 documents that we
7 finally agreed upon to submit and I think one was
8 withdrawn because we couldn't get a good copy of it;
9 although their copy was mysteriously, a perfect copy
10 produced by the defendant, oddly enough, just an
11 interesting aside, but we couldn't produce a good
12 enough copy so we withdrew HIPPO I, but HIPPO II and a
13 series of other documents, were introduced in evidence
14 or at least were offered

15 And the objection was made on various
16 grounds, some of the grounds, including inadvertent
17 production was not really an objection After all we
18 didn't steal them, they were in the -- they
19 were available on CD rom and Your Honor said that
20 would neither defeat nor establish any privilege that
21 may otherwise exist. So, fine, we went forward on
22 that question

23 So in order to establish -- now we're back
24 to basic law privilege. In order to establish a
25 privilege you have to have an attorney and giving a

1 communication to a client And we went on and on, and
2 I think only three of these documents even had an
3 attorney anywhere involved, so right from the start,
4 17 out of the 20 came in without even any further
5 analysis because there was no attorney involved

6 Then you had to have a communication. Well
7 we talked about this for a long time. We looked and
8 looked on this memo, the Edison Yeaman, and there's no
9 evidence of this communication Or should I say
10 there's no -- there is -- it is equally susceptible to
11 the interpretation that it was sent to the world or
12 not sent at all, either one of those would defeat the
13 privilege

14 The privilege only attaches when you send it
15 only to your client and not to anybody else.

16 So the burden of establishing a privilege is
17 on the person who makes the claim of privilege. We
18 never heard who got this memorandum, it's never been
19 said, that does not show who got it It would fail
20 right there, and we argued that, too.

21 The third -- and the third question then or
22 reason advanced by us against the privilege was the
23 crime fraud exception.

24 And Your Honor, I think, perhaps discussed
25 this and this was discussed in our brief, and I know

1 Your Honor researched it and ruled that it, correctly,
2 that these documents, really only one or two, that
3 even involved attorneys, were evidence of the crime
4 fraud exception to the attorney-client privilege

5 And we discussed all the cases that support
6 this, and I don't want to go over and get to that
7 level of detail because I think this was work already
8 done, but the big picture is this When I listened to
9 the argument, I heard counsel say, well, there
10 couldn't be a fraud because our view is the attorney
11 general already knew, or words to that effect

12 Let me correct any suggestions to the
13 contrary Our claim of fraud was not limited to
14 defrauding the attorney general Counsel seemed to be
15 carried away by this issue of the attorney general I
16 think that's a very interesting issue, I don't happen
17 to think it's the be all and end all of this
18 litigation Whether the attorney general was
19 defrauded or not, I can prove that he was or she was,
20 but I don't think that that matters for this
21 particular issue or, really, for the case in general.

22 The fraud was not only on the attorney
23 general but it was on the public and that was the
24 essence of our argument It was the essence of the
25 long and involved discussion by the appearing in the

1 Journal of the American Medical Association which we
2 attached, and it was also the essence of
3 Dr Feingold's testimony on that issue.

4 So as this fraud exception to the
5 attorney-client privilege came up, we discussed this
6 expert testimony through Dr Feingold who went in
7 depth and said that, yes, this information, the
8 concealing, the willful concealment of this
9 information from the public amounted to a fraud, and
10 the willful concealing of this from the Surgeon
11 General amounted to a surgeon -- to a fraud And the
12 willful concealment of this from the medical community
13 at the time amounted to a fraud

14 Now, again, counsel would like us to focus
15 only on these, I think, rather abstract issues of
16 nicotine addiction and would like us, I guess, to
17 accept Dr. Thompson's conclusions today, which I
18 don't and, frankly, I don't see how an affidavit from
19 an expert with new evidence can be considered at this
20 time, but in any case, these are issues which are
21 contested among experts and I think can be concluded
22 in many ways

23 But what I want to say is to focus solely on
24 addiction as the essence of the fraud is again to make
25 -- to oversimplify what -- or what the force of our

1 arguments were, because one of the biggest frauds that
2 was committed by Mr Yeaman, who was, I should add,
3 not only an attorney but also the executive vice
4 president, I failed to mention just a moment ago that
5 in order to find attorney-client, your attorney has to
6 be operating as an attorney Business advice is not
7 considered to be attorney-client privilege

8 And this was again something we went over in
9 detail in the case and I did not recall just a few
10 minutes ago but it's in our memorandum And when he
11 gave this, he was acting, at least as much as a vice
12 president giving business advice as an attorney

13 So -- but what was the essence of the fraud?
14 The fraud was not only failing to reveal the research
15 on addiction but failing to reveal to the public that
16 the product they were selling caused or predisposed
17 to lung cancer and was truly causative in emphysema
18 and caused and contributed to cardiovascular disease
19 and the many other things which are mentioned in here
20 on that issue.

21 As to the statement that Mr. Yeaman was not
22 being -- was not defrauding anybody because he
23 suggested a warning, I think that's a good argument to
24 a jury. In fact, a careful reading of the document
25 does not suggest that the warning that he was issuing

1 was going to admit to causation of lung cancer or
2 causation of cardiovascular disease and causation of
3 emphysema.

4 And, in fact, we know that the -- that when
5 the warning came out in 1966, it had nothing -- it did
6 not contain those admissions. So whatever motives we
7 might say for Mr Yeaman, I think the jury is entitled
8 to look at that.

9 To summarize what I've said -- I'm sorry to
10 have rambled -- but to summarize what I have said (a)
11 there was no showing -- well, first, one, there was a
12 showing of relevance of these documents and even
13 though without the documents, the jury had ample
14 evidence to indict American Tobacco in its former
15 incorporation as American, with Brown & Williamson's
16 documents, or rather, Brown & Williamson's documents
17 were relevant for those several reasons that I
18 suggested.

19 The claim of privilege was not well taken
20 for many reasons including attorneys not showing up on
21 most of the documents, when the attorneys did show up
22 they weren't acting as attorneys, and, third, as Your
23 Honor found, even if they were acting as attorneys,
24 which we don't think they were, the nature of their --
25 well, there was no communication with clients that

1 we're not aware of communications, but the nature of
2 what they were doing was to defraud the public as we
3 went through at length in the Journal of the American
4 Association and in Dr Feingold's testimony

5 I think that's Brown & Williamson's
6 documents If I've missed anything, I'll try to fill
7 in

8 Let me just summarize a few other things
9 that kind of struck me and then I will sit down
10 because I've probably been up here long enough

11 The issue of late filing, I think we've
12 discussed that There was no late filing, in fact, we
13 filed our exhibit list a week before the Court's
14 order There was a suggestion of something filed late
15 and I contest that Oh, the extrinsic and intrinsic
16 issue This is a very technical issue involving the
17 claim of the crime fraud exception to the privilege of
18 whether it has to be proven by extrinsic or intrinsic
19 documentation. Fact is it was proven by both Our
20 extrinsic evidence was Dr Feingold's testimony and
21 other documents in the same set which were not
22 themselves privileged because attorneys weren't a part

23 For instance, a Tentative Hypothesis of
24 Nicotine Addiction was not authored by an attorney,
25 could not be an attorney-client issue, offered

1 extrinsic proof that the crime fraud existed when read
2 in conjunction with the Edison Yeaman memorandum

3 So as a technical issue, yes, there was both
4 intrinsic and extrinsic, I don't know how much sense
5 that really makes but there was both

6 As to the factual claims of whether HIPPO
7 was right or wrong, again, this is a -- these are
8 issues which ultimately are jury issues and I think
9 that they were ably argued at trial, counsel certainly
10 did an able job at impeaching Dr Feingold that he
11 didn't know and so forth and so on

12 The -- as to the reasons behind withdrawing,
13 again, we've covered that

14 On the Dracket rule and let me hit the
15 Dracket rule on the question of Dr. Feingold's saying
16 what the Surgeon General would have done

17 I am puzzled with this Dracket rule because
18 as I remember it, I argued that -- I argued against --
19 it seems to me that what we argued at pretrial that
20 the defense should not be able to ask the plaintiff
21 what he would have done because that would violate the
22 Dracket rule, but they did.

23 And having done that, we did on redirect
24 asked it again, and I think that that's what happened,
25 because we were the ones who raised the Dracket rule

1 to begin with

2 This whole Dracket rule created kind of an
3 odd situation We just heard the defendant say they
4 were entitled to a directed verdict because -- or a
5 judgment notwithstanding the verdict because we didn't
6 prove whether Grady Carter would have done something
7 different had the warning been different, which seems
8 to me to lead right into the same issue.

9 As I remember procedurally, Your Honor, this
10 was a case of the door being opened by the defendants
11 into this area which we originally thought was not a
12 proper area based on the Dracket rule The door was
13 open but I don't have the transcript yet so I can't
14 show you the question But I remember this whole
15 issue coming up and it was a puzzling issue for all of
16 us, but now to turn around and blame me for violating
17 the Dracket rule, something is amiss but I can't quite
18 figure out what it is, I'm sorry

19 But in any case, I think the record will
20 show, and I hate to say it without looking at it, that
21 our questions to Grady Carter were in response to the
22 door having been opened about this whole issue of it
23 wouldn't have made any difference had we put a warning
24 on.

25 And I think maybe once the defendant argues

1 that, that that opens the door to this whole
2 testimony, perhaps that's the answer, although I can't
3 -- not having the transcript, we've done our best to
4 try to remember, maybe my learned partner can help me
5 with that but I -- since you did the testimony -- I
6 can't remember. But I think that -- I think what we
7 had analyzed was that having opened the door, and I
8 don't remember if it was done on cross or if it was
9 done in arguments, that, well, what difference does it
10 make, you know, he wouldn't have done anything

11 different He's got to open the door He's got to be
12 able to say whether he did once that argument is made

13 And if the argument can't be made, then that
14 may be that that's a different issue But I think we
15 preserved that rule by saying I don't think that
16 argument should be made, but I think it was overruled
17 so that's all I can remember about that but I was
18 shocked to see the Dracket rule back at me.

19 The next thing was the idea that
20 Dr. Feingold shouldn't have been able to say what the
21 Surgeon General had -- would have done or would not
22 have done, again, I think this was something that
23 first came -- was in response to the defendants
24 arguing the question of -- the significance of the '64
25 report, which then opened the door to the basis of the

1 '64 report

2 And I think that the questions on what the
3 Surgeon General might have done with the information
4 were fair inferences from the Surgeon General
5 declaring in the text that it was -- that there was a
6 gap in knowledge and also from the analysis done in
7 the public medical literature, including in the
8 Journal American Medical Association which talked
9 about the significance of this kind of research and
10 what it would have shown.

11 So Dr Feingold talked about those and I
12 think that his opinions on that were fairly open to
13 cross and that they had adequate opportunity in
14 cross-examination to show, if they could, that the
15 opinions weren't worth much, if that's what they
16 believed, and to argue to the jury that really it
17 didn't matter or that Dr. Feingold wouldn't have
18 known. And I think that's fair, that certainly goes
19 to the weight of any opinion testimony. But was he
20 entitled to give the opinion? I think yes, because
21 the opinion was based on his knowledge and experience,
22 i.e., of the documents themselves, of reading of the
23 '64 report.

24 So I don't think that that's an -- I think
25 that that's an interesting evidentiary question but I

1 think ultimately it goes to the weight and not the
2 admissibility

3 In any case, none of those kind of things, I
4 think, can be shown to be, if error, harmful error,
5 since there was adequate evidence on which to sustain
6 the verdict a hundred times over from evidence that we
7 had heard no contest about

8 And if I have been inadequate in responding,
9 Your Honor, I apologize I'll certainly be willing to
10 respond as Your Honor requests Thank you

11 THE COURT Mr Riley?

12 MR. RILEY: Thank you, Your Honor Your
13 Honor, Mr Wilner claimed that we were aware of these
14 documents and that therefore we should have been
15 prepared to try a case based on those documents,
16 that's what Mr. Wilner suggested here

17 Your Honor, there's lots of documents out
18 there, that doesn't advise means of where or what
19 claims are in the case, what's going to be relevant at
20 trial, and what documents I need to be prepared to
21 address, what witnesses I need, what fact witnesses
22 and what my experts need to be prepared to address
23 There may be thousands of documents out there.

24 You know, the only way I get ready for a
25 trial, Your Honor, is by looking at the pleadings, by

1 looking at the discovery responses that I get, that's
2 what I do to get ready for a case.

3 And, Your Honor, there was never any
4 indication the plaintiffs were going to rely on this
5 HIPPO research in any of the pretrial pleadings or any
6 of the discovery responses They never ever indicated
7 their intent to rely on the HIPPO research

8 Mr. Wilner made the claim, Your Honor, that
9 there were lots of documents or there's lots of
10 evidence in the record to support this verdict He's
11 told the press, he's made comments about the
12 importance of the documents at the outcome of this
13 trial

14 He's told the press basically he thinks
15 that they were decisive of the trial. He thinks and
16 here's what he told -- here's what he said on CNN
17 three days after the verdict, on August 12th, he said,
18 when the jury saw the documents and what Brown &
19 Williamson Tobacco -- what Brown & Williamson Company
20 had been saying all these years, they couldn't believe
21 it.

22 In the current edition of the ABA Journal,
23 Mr. Wilner says, we had all we needed in the Brown &
24 Williamson documents

25 Judge, there's no question that these

1 documents played a very, very important part in the
2 trial of this case Mr Wilner recognizes it; he's
3 told the press this He's broadcast it all over the
4 country, there's no secret about it

5 So, you know, for him now to stand up and
6 say, well, really, it didn't make that much of a
7 difference, I think he's really being duplicitous,
8 Your Honor I don't think he can have it both ways

9 Your Honor, he talked about the fact that
10 Mr Yeaman's memo could be seen as an admission by the
11 company, by Brown & Williamson, about the addictive
12 quality of nicotine

13 First of all, Your Honor, I think we're now
14 in a position to show -- we were not in a position to
15 show before -- that Mr Yeaman based that statement on
16 research that was flawed, that was wrong.

17 The appraisals show, and it's not at all
18 clear that Mr. Yeaman was aware of these appraisals,
19 we don't know that he had seen them, we don't know
20 that he had an opportunity to review them, but the
21 research was criticized at the time as being flawed
22 and fundamentally incorrect

23 And importantly, Your Honor, there were
24 others, other scientists out there at the same time
25 who were aware of the same pharmacological properties

1 of nicotine that are discussed in this research and
2 they nevertheless concluded that the nicotine is not
3 addictive

4 So Mr. Yeaman's conclusions were simply
5 wrong and had we been given the opportunity, Judge, we
6 could have shown that to the jury

7 Mr. Wilner argued about the fact that it's
8 unclear who this memo was sent to In a way, Your
9 Honor, I think if the lawyer prepares a memo, and one
10 of the things that Mr Wilner suggested was that it
11 was just stuck in his file, well, if it's in the files
12 of the general counsel, if he writes it to himself in
13 order to provide legal advice to his client, I think
14 that's a privileged document, he's writing it, in
15 effect, to himself but it is a communication, it is a
16 document prepared in order to render advice to that
17 corporation and it is privileged

18 If, in fact, he didn't write it in his
19 capacity as a corporate officer, in his capacity as
20 counsel to a company, then what was it? Was it
21 private musings that he just stuck in his drawer and
22 didn't send to anybody?

23 If all it was was Edison Yeaman writing
24 private musings not in his capacity as general counsel
25 of the company, it didn't have any probative value.

1 The only way it could act as an admission by the
2 company was if it was written in his capacity as a
3 corporate officer, Your Honor, so either way the
4 document should not have been admitted

5 Either, one, it was privileged, or on the
6 other hand, if Mr Wilner's hypothetical is correct,
7 then it had no probative value. In that case it would
8 just be a private memo, mere musings and no probative
9 value at all

10 Again Mr Wilner read from page three of the
11 memo comparing nicotine research and, Judge, we would
12 just show, we would now be in a position to show that
13 that research was fundamentally flawed

14 And the same with respect to Mr. Wilner's
15 argument that the document was relevant to the state
16 of the art issue.

17 Mr. Wilner now claims that he wasn't
18 claiming fraud on the Surgeon General He's claiming
19 fraud on the public.

20 Your Honor, he never asserted a claim for
21 fraud in this case, that's the whole reason that we
22 didn't have notice that this was going to be an issue
23 in the case He says, I'm claiming fraud of the
24 public.

25 Well, where is there an allegation in the

1 complaint that Brown & Williamson committed fraud on
2 anybody, much less on the public? He can't have it
3 both ways, Judge

4 THE COURT: You know, you've always made
5 that argument consistently throughout this trial and
6 every time you make it, you confuse me because I
7 understand the exception to not need to be pled if it
8 is an evidentiary ruling that I'm asked to make

9 MR RILEY Judge, I think this is pertinent
10 because it goes to show what we needed to do to get
11 ready for this case.

12 There's no -- if we had been told, look,
13 there's fraud, we've got a fraud count in this case
14 and the fraud is your failure to disclose this
15 research --

16 THE COURT: Mr Riley, that's like saying
17 during the course of trial when a document is offered
18 that you need to be put on notice before it's offered
19 that an exception to the hearsay rule is going to be
20 invoked

21 MR. RILEY Your Honor, I beg to differ. I
22 think that when we're talking about the crime fraud
23 issue, we're talking about certain procedures that
24 must be adhered to before the document can be offered
25 and received in evidence you must hold a hearing, the

1 plaintiffs --

2 THE COURT: Did we not?

3 MR RILEY. Your Honor, I don't believe
4 there was an adequate hearing, no

5 THE COURT An adequate hearing, but we did
6 hold a hearing

7 MR RILEY Your Honor, we were confronted
8 on the eve of trial with hundreds and hundreds of
9 privileged documents that Mr. Wilner said he was going
10 to offer into evidence, how was it realistically
11 possible in the midst of preparing for the trial that
12 we also had to get ready for, let's not forget that,
13 but in addition to that, get ready for a series of
14 hearings with respect to the admissibility of these
15 documents, Judge? I don't think that's realistic, I
16 just don't know.

17 THE COURT: I understand your position

18 MR. RILEY: Judge, with respect to the --
19 well, I would also add, Your Honor, that even if
20 Mr Yeaman's memo reflected Brown & Williamson's
21 position, I don't think that's relevant to the
22 lawsuit

23 What's pertinent to the lawsuit is The
24 American Tobacco Company's position

25 Brown & Williamson never acquired American

1 until long after this lawsuit was filed and so what's
2 pertinent and what's relevant is American Tobacco
3 Company's position There's no showing that this
4 HIPPO research was known to American There's no
5 showing that Mr. Yeaman's views represented the views
6 of anybody in The American Tobacco Company

7 I would also point out, Your Honor, and the
8 final point I'd make is, in this case, Judge, the
9 Dracket rule was turned on its head Dracket is
10 supposed to prevent a fact witness from getting on the
11 stand and talking about hypotheticals, things that
12 never occurred because that testimony is speculative

13 Mr Carter was allowed to offer that
14 testimony, we think improperly, and I know Mr. Wilner
15 wasn't specific when he said we opened the door, I'm
16 not sure what he's talking about so I can't respond,
17 but I don't think there's any way that we opened the
18 door to that on the cross-examination

19 So on the one hand we have Mr Carter who is
20 a fact witness is allowed to get on the stand and talk
21 about things that never happened, to speculate, to
22 respond to hypothetical questions

23 Dr Feingold, on the other hand, is an
24 expert, experts are supposed to respond to
25 hypothetical questions

1 We asked Dr Feingold whether a warning
2 would have deterred Mr. Carter from quitting smoking
3 and Your Honor refused to allow that examination.

4 We think those questions were proper put to
5 an expert because an expert responds to hypothetical
6 questions A fact witness on the other hand is not
7 supposed to So we think the Dracket rule was turned
8 on its head in this case because the expert was
9 prohibited from testifying about this but Mr Carter
10 was allowed to Thank you, Judge

11 THE COURT Thank you, Mr Riley.

12 MR WILNER Your Honor, we really don't
13 have anything Unless Your Honor has anything
14 particular with us, we have nothing further

15 THE COURT No, you did mention the
16 possibility of responding in writing if I so desired
17 or perhaps if you so desired

18 MR. WILNER Yes, sir

19 THE COURT Do you wish that opportunity?

20 MR. WILNER: Your Honor, what we would like
21 is just by close of business tomorrow, if we have
22 anything upon reviewing this that we would like to let
23 the Court know, we would like that opportunity.

24 THE COURT. Let's assume that's the case
25 just for purposes of discussion, how much time would

1 you ask to have to respond?

2 MR WILNER: Your Honor, we would like to
3 move this along so I think that if we could respond
4 within -- what is today, Tuesday -- by Monday morning,
5 that would be less than a week and give us a chance to
6 move it along

7 THE COURT: All right Any objection to
8 that, Mr Riley?

9 MR RILEY. No, Your Honor

10 THE COURT Okay Very good I'll look to
11 get something from you on Monday, if not, I will study
12 what has been provided and the record and make a
13 decision

14 MR. WILNER Thank you, Your Honor

15 (The hearing was concluded at 2 35 p m)

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CERTIFICATE

STATE OF FLORIDA)
COUNTY OF DUVAL)

I, Connie Jo Ramirez, Registered
Professional Reporter, certify that I was authorized
to and did stenographically report the foregoing
proceedings and that the transcript is a true and
complete record of my stenographic notes

DATED this 5th day of November, 1996

Connie Jo Ramirez
Connie Jo Ramirez, RPR

